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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. ——— 76-1653

AMERICAN INSTITUTE FOR SHIPPERS' ASSOCIATIONS, INC.,
HARRY DEMONTMOLLIN,
FLORIDA ALL STATE CONSOLIDATORS, INC.,
NEW JERSEY SHIPPERS POOLING ASSOCIATION, INC.,
and
SUNSHINE STATE SHIPPERS AND
RECEIVERS ASSOCIATION, INC.,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION
and
UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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May 25, 1977

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INTERSTATE COMMERCE COMMISSION
and
UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

American Institute For Shippers' Associations (AISA) petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this case on February 24, 1977.

OPINIONS BELOW

The judgment of the Court of Appeals appears in Appendix A hereto. The memorandum opinion of the Court of Appeals appears in Apendix B hereto. The opinion of the Interstate Commerce Commission is reported at 350 ICC 391-423.

JURISDICTION

The judgment of the Court of Appeals was entered on February 24, 1977 (Appendix A), and this petition is filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §§ 1254(1) and 2350(a).

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission may curtail the ability of nonprofit cooperative shippers' associations to market the products of their members by declaring that a shippers' association, long recognized to be itself a shipper, is ineligible for membership in a similar "association of shippers," contrary to the intent of Congress that shippers' associations shall enjoy a preferred status in the nation's transportation industry.

2. Whether the Interstate Commerce Commission is bound to comply with the pre-investigation requirements of the Administrative Procedure Act, specifically 5 U.S.C. § 558(c), in a proceeding looking toward the withdrawal of a statutory exemption or permission accorded transportation entities excluded from economic regulation.

STATUTES INVOLVED

Sections 402(a)(5) and 402(c)(1) of the Interstate Commerce Act, 49 U.S.C. §§ 1002(a)(5) and 1002(c)(1), and Title 5, United States Code, §§ 551(8) and 558(c) are set forth in Appendix C hereto. Particularly relevant to this petition is the language of Section 402

(c)(1) of the Interstate Commerce Act which provides that the provisions of the Interstate Commerce Act that regulate freight forwarders shall not be construed to apply to an "association of shippers, in consolidating or distributing freight . . . for the members thereof, on a nonprofit basis, for the purpose of securing the benefits of carload, truckload, or other volume rates . . . ."

STATEMENT

Petitioner American Institute for Shippers' Associations, Inc., (AISA) is a national trade association whose members include nonprofit cooperative shippers' associations, excluded from federal economic regulation by Section 402(c)(1) of the Interstate Commerce Act. AISA was an intervenor in the proceedings before the Interstate Commerce Commission in support of Sunshine State Shippers and Receivers Association, Inc., and was one of the joint petitioners before the United States Court of Appeals for the District of Columbia Circuit. The members of AISA are vitally concerned with the issues presented in this petition.

Petitioner Sunshine State Shippers and Receivers Association, Inc., (Sunshine), was organized in 1971 with the stated purpose of operating as an unregulated shippers' association under the terms of Section 402(c)(1) of the Interstate Commerce Act. The membership of Sunshine consisted of both businesses and manufacturers, and also other shippers' associations operating pursuart to Section 402(c)(1) of the Interstate Commerce Act. One of the shippers' association members of Sunshine was New Jersey Shippers Pooling Association, Inc. (New Jersey Shippers), a New Jersey shippers' association that joined Sunshine so that it would have a voice in the operations of Sunshine.

The Interstate Commerce Commission (ICC) commenced an investigation of Sunshine in order to deter-

mine whether Sunshine was operating as a regulated freight forwarder, as defined in Section 402(a)(5) of the Interstate Commerce Act, or whether Sunshine was operating as a bonafide shippers' association. After seven days of hearings and after reviewing the evidence, Administrative Law Judge Gibbons found only one serious defect in the operations conducted by Sunshine: *the fact that Sunshine allowed other shippers' associations to become members.* Judge Gibbons, however, did not issue a cease-and-desist order. Rather, because such membership was not specifically prohibited by any Commission decision or regulation, and because Sunshine had fully cooperated with the Commission's investigation, Judge Gibbons gave Sunshine a reasonable opportunity to bring itself into compliance.[1]

All parties filed exceptions to Judge Gibbons decision and on August 1, 1975, Division 1 of the ICC issued a 33 page report (350 ICC 391-423). The written report rejected Judge Gibbons' finding that Sunshine should be given an opportunity to achieve compliance. Instead, the Commission found Sunshine to be operating as a freight forwarder and issued a cease-and-desist order.

The ICC action thus barred a nonprofit cooperative shippers' association from joining another similar shippers' association. New Jersey Shippers, which had joined Sunshine in order to insure that Sunshine handled the freight of New Jersey Shippers promptly, properly, and efficiently, was forced to give up its membership in Sunshine.

Petitioners appealed the ICC decision to the U.S. Court of Appeals for the District of Columbia Circuit. The ICC took the position before the Court of Appeals that

[1] Judge Gibbons, however, did not specifically rule that Section 558(c) of Title 5, United States Code, deprived the Commission of jurisdiction over the proceeding.

it did not intend to strictly interpret its holding of law that barred one shippers' association from joining another shippers' association. Rather, in order to justify its position, the ICC made several concessions. The ICC conceded that Sunshine could bring itself into compliance with the outstanding cease-and-desist order by merely enrolling the individual members of Sunshine's member shippers' associations as members of Sunshine. The ICC further conceded that these new members could appoint a representative as their agent to oversee their interests in Sunshine (Appendix B, page 1). Based upon these representations the Court of Appeals affirmed, noting that had it addressed the membership issue in the first instance "we might not choose the interpretation of Section 402 proposed by the Commission." (Appendix B, page 2).

The Court of Appeals opinion, attached hereto as Appendix B, fails to recognize the anomalies created by its decision and the extreme burdens placed on shippers' association by its dual membership theory. Even more disturbing, however, is the failure of the Court of Appeals to recognize the clear meaning of Section 402(c) of the Interstate Commerce Act which excludes from regulation an "association of shippers." Since a shippers' association has consistently been recognized to be a shipper and not a carrier, such associations clearly qualify for membership in an "association of shippers."

REASONS FOR GRANTING THE WRIT

I. THIS APPEAL INVOLVES SIGNIFICANT STATUTORY AND POLICY CONSIDERATIONS IN THE ADMINISTRATION OF THE INTERSTATE COMMERCE ACT IN THAT THE DECISIONS BELOW SEVERELY CURTAIL THE ABILITY OF NONPROFIT COOPERATIVE SHIPPERS' ASSOCIATIONS TO MARKET THE PRODUCTS OF THEIR MEMBERS BY ABROGATING THE RIGHT OF A SHIPPERS' ASSOCIATION, EXCLUDED FROM REGULATION BY SECTION 402(C)(1) OF THE INTERSTATE COMMERCE ACT, FROM ENJOYING THE INHERENT ADVANTAGES OF MEMBERSHIP IN OTHER SHIPPERS' ASSOCIATIONS

A. The Decisions Below Violate The Intent Of Congress That Shippers' Associations Shall Enjoy A Preferred Status Within The Scheme Of National Transportation

Nonprofit cooperative shippers' associations have been in existence in the United States since at least the turn of the twentieth century. The cooperative shipping movement has grown so that today shippers' associations are located in virtually every major city in the United States and in many smaller cities throughout the country. In *Investigation Into Status of Freight Forwarders*, 339 ICC 711 (1971), the Interstate Commerce Commission contrasted the static growth of regulated freight forwarders with the rapid growth of shippers' associations as follows:

> If any one thing is clear from the evidence assembled in the course of the present investigation it is that (regulated) forwarding is at best a static industry . . . .
>
> At the same time, the growth of the unregulated, nonprofit shippers' associations has been rapid and regular. (339 ICC 792).

This growth, however, has not been encouraged by the Interstate Commerce Commission. The seventy year judicial history of shippers' associations reveals that the ICC has repeatedly sought to restrain their legitimate activities. Each time, however, a conscientious judiciary has recognized each attempt as being inconsistent with the mandate of Congress that shippers' associations remain a viable and important segment of this country's transportation industry. For example, *Pacific Coast Wholesalers' Association* v. *United States*, 81 F. Supp. 991 (S.D. Calif. 1949), *aff'd* 338 U.S. 689 (1950), struck down an ICC decision that would have limited the operations of shippers' associations to those instances where the member is the actual *shipper* of the freight, thus barring a shippers' association from handling any freight where the member is the *receiver* of the freight.

The ICC decision below reflects the same obstructionist view towards the growth of shippers' associations as that expressed in *Pacific Coast Wholesalers' Association*. The ICC holds very simply that a shippers' association is ineligible for membership in another shippers' association. The crux of the ICC reasoning is that since shippers' associations have no direct beneficial interest in the property they handle for their members, they cannot be considered to be shippers, and therefore are incapable of qualifying for membership in an "association of shippers." (350 ICC 404). This reasoning, however, is illogical and conflicts with the Congressional mandate in Section 402 (c) (1) that shippers be permitted to combine and coordinate their shipments by any means whatsoever. Section 402(c) (1) provides that the ICC shall not construe Part IV of the Act so as to apply its regulatory terms to a "group or association of shippers." The true issue, therefore, is whether a shippers' association can be classified as a shipper. If in fact the shippers' association members of Sunshine are shippers, the inquiry must stop since

Sunshine would in law be an "association of shippers" within the literal meaning of Section 402(c)(1) of the Interstate Commerce Act.

Long before the enactment of Part IV of the Interstate Commerce Act, shippers' associations were recognized to be "shippers" rather than carriers. *California Commercial Association* v. *Wells, Fargo & Company*, 14 I.C.C. 422 (1908). The modern day shippers' association has also been held to be a "shipper." *Atlanta Bonded Warehouse, Inc., Common Carrier Application*, 91 M.C.C. 104 (1962). Since shippers' associations are "shippers", it must follow that an "association of shippers" must include an "association of shippers' associations." By holding otherwise the ICC and the Court of Appeals below contravened the clear and unambiguous meaning of the statute.

Since statutory construction is a judicial function, the Federal Courts are not bound by the construction the ICC gives to the Interstate Commerce Act but rather must construe the statute themselves. *Miller* v. *Burger*, 161 F.2d 992, 994 (9th Cir. 1947). Nor should the Federal Courts slip into judicial inertia by standing aside and rubber-stamping administrative interpretations. *Federal Maritime Commission* v. *Seatrain Lines*, 411 U.S. 726 (1973); *Wilderness Society* v. *Morton*, 479 F.2d 842 (D.C. Cir. 1973), *cert. den.* 411 U.S. 917 (1973). The Court of Appeals failed to recognize these principles of statutory construction when it stated in its opinion that had it addressed the issue in the first instance "we might not choose the interpretation of Section 402 proposed by the Commission." (Appendix B, page 2).

It was the responsibility of the ICC and the Court of Appeals to apply the Interstate Commerce Act on the basis of what Congress had written, not what Congress might have written. *United States* v. *Great Northern*

Ry., 343 U.S. 562 (1952). Since the statutory language in question defines a shippers' association as an "association of shippers," and since a shippers' association is recognized to be a shipper, the language of Section 402(c)(1) must be taken literally and a shippers' association must be declared eligible for membership in "an association of shippers." *Commissioner of Immigration* v. *Gottlieb*, 265 U.S. 310 (1924). The ICC decision below represents nothing less than an unlawful attempt to rewrite the Interstate Commerce Act, and to give effect to Commission ideas of policy. *Busse* v. *Commissioner*, 479 F.2d 1147 (7th Cir. 1973).

The intent of Congress is clearly expressed in the broad language of Section 402(c)(1) of the Interstate Commerce Act. The ICC declared in 1964 that Section 402(c)(1) "clearly safeguards the right of all shippers to combine their goods, on a nonprofit basis, for the purpose of obtaining the transportation savings flowing from their collective ability to utilize volume rates." *Atlanta Shippers Association, Inc.—Investigation*, 322 I.C.C. 273, 277 (1964). In its decision below the Commission refused to recognize that its holding of law violated both the letter and the spirit of Section 402(c)(1). Section 402(c)(1) is a direct recognition by Congress that small shippers, faced with increasing transportation costs for less-than-truckload and less-than-carload shipments, must turn to nonprofit cooperative shippers associations in order to take advantage of volume rates. The impact of the holding below will have its greatest impact on these small shippers. It is not an exaggeration to state that the inability of shippers' associations to hold memberships in other shippers' associations will place the smaller industries of this nation at an economic disadvantage with their larger competitors who can ship their products at volume rates. In *Interstate Commerce Commission* v. *Delaware, Lackawanna, and Western Railroad Co.*, 220

U.S. 235 (1911). this Court was faced with a railroad tariff provision which would have precluded shippers' associations from taking advantage of volume carload rates. In striking down the provision, this Court favorably cited the following language from an earlier ICC decision in *California Commercial Association* v. *Wells Fargo & Co.*, 14 I.C.C. 422 (1908), which struck down a similar tariff provision:

> It is not an exaggeration to say that the enforcement of such a rule by the carriers of the United States would bring disaster upon thousands of the smaller industries, and more surely establish the dominance of the greater industrial and commercial institutions. (14 I.C.C. 434, cited at 220 U.S. 244).

The decisions below will have an impact identical to that of the tariff provision chastised by this Court in the *Delaware, Lackawanna* decision. Thus the issues in this case are of paramount importance to the continued vitality and growth of the nonprofit cooperative shipping movement in this country and warrant review by this Court.

In *Baltimore Shippers and Receivers Association* v. *Public Utilities Commission of California*, 268 F. Supp. 836 (N.D. Calif. 1967), *aff'd per curiam*, 389 U.S. 583 (1968), the State of California attempted to subject to state regulation interstate motor carriers serving nonprofit cooperative shippers' associations within commercial zones. In resolving the issue in favor of the associations, the district court noted that Section 402(c)(1) of the Interstate Commerce Act "indicates that nonprofit shippers' associations enjoy a preferred status within the scheme of national transportation." This Congressionally mandated preference accorded to shippers' associations is destroyed by the rulings below which prevent shippers' associations from enjoying the inherent advantages of

membership in other shippers' associations. The task of overturning the rulings below and preserving Congress' mandate is now left to this Court.

The Court of Appeals below justified its rubberstamp of the ICC decision by protecting the right of the individual members of Sunshine's member shippers' associations to become members of Sunshine and appoint a representative as their agent to oversee their interests in Sunshine. Such measures, however, do not eliminate the unambiguous provisions of Section 402(c)(1) which clearly open membership in a shippers' association to other shippers' associations. Nor do such measures eliminate the fact that the Congressional mandate expressed in Section 402(c)(1) has been violated. In addition, such measures impose economic and administrative barriers such as membership fees, additional paperwork, duplicity of operation, and the necessity for proxy solicitations, all of which have no place in a nonprofit cooperative shippers' association which returns each dollar of savings to its members.

By providing for dual membership the Court of Appeals decision recognizes the need for one shippers' association to join another shippers' association. Yet the Court of Appeals refuses to satisfy that need. The Court of Appeals in effect does everything but answer the membership issue in the affirmative. Its failure to take that last necessary step and to enforce the expressed intent of Congress mandates review and reversal by this Court.

B. The Decisions Below Contravene The Principles Enunciated In *Columbia Shippers And Receivers, Inc.* v. *United States*, And Create Serious Anomalies In the Proper Interpretation And Administration Of the Interstate Commerce Act In That the Decisions Below Permit A NonProfit Cooperative Shippers' Association To Utilize The Services Of Another Shippers' Association But At The Same Time Prohibit A Shippers' Association From Becoming A Member Of Another Shippers' Association

Prior to the formation of Sunshine, New Jersey Shippers Pooling Association, Inc., had encountered operational difficulties in moving the freight of its members into the Florida market. The pre-Sunshine procedure followed by New Jersey Shippers was to ship freight into Florida, consolidate the freight in Florida with the freight of another shippers' association, and finally distribute the consolidated shipment to the ultimate consignees.

The consolidating of freight from one shippers' association with the freight of another shippers' association is an industry practice commonly referred to as "co-loading." The practice of co-loading has been considered lawful for many years. Almost thirty years ago the Commission sanctioned co-loading in *Pacific Coast Wholesalers Association, Investigation of Status*, 264 I.C.C. 134 (1945), *aff'd Pacific Coast Wholesalers' Association* v. *United States*, 81 F. Supp. 991 (S.D. Calif. 1949), *aff'd* 338 U.S. 689 (1950). One finding made by the Commission in *Pacific Coast* was that "no freight is handled for nonmembers, but one similar association is permitted to ship its freight in cars consigned to the respondent association." (264 I.C.C. 138). Thus, finding that associations shipped their freight together in the same rail car, the Commission also found that the "respondent corporation is an association of shippers engaged in consolidating and distributing freight for its members, on

a nonprofit basis, for the purpose of securing the benefits of carload, truckload, or other volume rates . . . and that no violation of Part IV of the act has been shown." (264 I.C.C. 142).

More recently in *Columbia Shippers and Receivers Association, Inc.* v. *United States*, 301 F. Supp. 310 (D. Del. 1969), the Court considered the issue of whether one association's "practice of co-loading with other nonprofit shippers' associations" contravenes the Interstate Commerce Act. The Court affirmed the ICC's ruling that shippers' associations may indeed combine their freight in order to take advantage of volume rates. The Court cited with approval the language employed by the ICC in defending its position that one shippers' association could co-load with another shippers' association:

> . . . when (Columbia Shippers and Receivers) co-loads with another shippers' association, both are engaged in furtherance of their nonprofit activities pursuant to the statutory objective of Section 402 (c). 105 M.C.C. at 856. (301 F. Supp. 320).

This same rationale is applicable to the membership issue. When one shippers' association joins another shippers' association both are engaged in furtherance of their nonprofit activities pursuant to the statutory objective of Section 402(c).

It is clear that for thirty years the ICC has permitted shippers' associations to enjoy the most obvious physical benefit of membership in other associations: co-loading. Yet the decisions below bar shippers' associations from enjoying the other inherent advantages of membership. The most obvious advantage of membership is the right to control the shippers' association by voting and sitting on the board of directors. Membership also eliminates the necessity of costly duplicative services and additional paperwork. The effect of the decision below, therefore, is to create the anomalous situation whereby a shippers' association may enjoy the physical benefits of member-

ship in other shippers' associations but at the same time may not enjoy the other benefits of membership. The anomalies thus created by the decisions below warrant review by this Court.

Section 402(c)(1) clearly expresses the intent of Congress that small shippers should be permitted to join together in a nonprofit cooperative effort in order to market their products at inexpensive volume rates. *Columbia Shippers* recognizes this intent of Congress by providing that shippers' associations shall be permitted to avail themselves of the services offered by all regulated and unregulated transportation entities. The decisions below contravene the clear intent of Section 402(c)(1) and the principles enunciated in *Columbia Shippers* by denying membership in a shippers' association to other shippers' associations even though such membership is necessary for the proper marketing of small shipments. The radical differences in approach taken by the ICC and the Court of Appeals below and by the court in *Columbia Shippers*, in interpreting Section 402(c)(1) of the Interstate Commerce Act, warrant review by this Court in order to insure a uniform approach in the administration of the Interstate Commerce Act and in order to insure that nonprofit cooperative shippers' associations maintain their proper role in this nation's transportation industry.

II. THE FAILURE OF THE COURT OF APPEALS TO ADDRESS THE ISSUE OF WHETHER THE ICC IS BOUND TO COMPLY WITH THE PROCEDURAL SAFEGUARDS OF 5 U.S.C. § 558(C) IN A PROCEEDING LOOKING TOWARD THE WITHDRAWAL OF A STATUTORY EXEMPTION OR PERMISSION LEAVES UNANSWERED A FUNDAMENTAL AND VITAL ISSUE OF NATIONAL IMPORTANCE IN THE APPLICATION OF THE ADMINISTRATIVE PROCEDURE ACT

One of the overriding and fundamental principles of transportation regulation is the principle that carriers should be permitted stability of operation; that is, that their investment in operations be protected. Carriers, freight forwarders, and shippers' associations, whether they operate by rail, water, motor or air, expend many dollars each year so that they may better serve the shipping and traveling public. These entities would be reluctant to conduct their operations if they were not assured that their investment would be protected against agency intervention. One of the tools used by Congress to provide these entities with stable operations has been the enactment of the Administrative Procedure Act, and specifically 5 U.S.C. § 558(c), which provides that prior to the revocation of a license the licensee must be given notice of the facts or conduct and opportunity to demonstrate or achieve compliance.

Once a regulated carrier is issued a certificate and commences operations, with the concomitant investment in facilities and personnel, Congress has seen fit to protect the carrier's investment by narrowly limiting the power of the appropriate regulatory agency to suspend or revoke the outstanding certificate. This Court has long recognized this fundamental principle that the outstanding operating certificates of carriers are endowed with a special status in order to promote stable and

secure operations. This Court has stated, with respect to the Interstate Commerce Commission, that in "order to provide stability for operating rights of carriers, Congress placed within very narrow limits the Commission's power to suspend or revoke an outstanding certificate." *Castle* v. *Hayes Freight Lines, Inc.*, 348 U.S. 61, 63 (1954). Also, as to air carriers, this Court has said, "it is clear from the statements of the supporters of the predecessor of the Aviation Act—the Civil Aeronautics Act of 1938—that Congress was vitally concerned with what has been called 'security of route'—i.e., providing assurance to the carrier that its investment in operations would be protected insofar as reasonably possible. And there is no other explanation but that Congress delimited the Board's power to reconsider its awards with precisely this factor in mind . . . ." *CAB* v. *Delta Air Lines*, 367 U.S. 316, 324 (1961).

Likewise, the protection afforded by the Administrative Procedure Act has been extended to unregulated entities. Title 5, United States Code, §551(8) defines a "license" as including "statutory exemption or other form of permission." The operations of a shippers' association are conducted pursuant to Section 402(c)(1) of the Interstate Commerce Act, clearly the type of "statutory exemption or other permission" contemplated by the definition of license contained in the Administrative Proceduce Act. *Blackwell College of Business* v. *Attorney General*, 454 F.2d 928 (D.C. Cir. 1971); *Nuclear Data Inc.* v. *Atomic Energy Commission*, 344 F. Supp. 719, 724 (N.D. Ill. 1972).

This case demonstrates an awesome power in the hands of the ICC—the power to issue cease-and-desist orders against unregulated entities without first providing an opportunity to demonstrate or achieve compliance. The practical effect of such litigation and cease-and-desist orders is destruction of a previously viable organization.

While litigation may be a cost of doing business, the prospect of avoiding litigation by providing an opportunity to demonstrate or achieve compliance should be a goal of the ICC and this Court.

The position of petitioners is all the more meritorious in light of the fact that the ICC has acknowledged the noveity of its substantive ruling and the Court of Appeals has acknowledged that had it faced the issue in the first instance it might have reached a different result. The issuance of a cease-and-desist order under such circumstances clearly requires an opportunity to achieve compliance. Failure to grant such an opportunity constitutes a retroactive application of a newly adopted rule and violates the basic concepts of fair play. *National Labor Relations Board* v. *Guy F. Atkinson Co.*, 195 F.2d 141, 148 (9th Cir. 1952).

We believe that determination of this issue is of significant importance to the nation and to the entire unregulated transportation industry which must know whether its present investments are subject to yet another regulatory threat. The ICC has here successfully nullified the impact of the procedural safeguards contained in the Administrative Procedure Act. This Court should review this issue in order to insure that the safeguards contained in the Administrative Procedure Act are properly interpreted and enforced.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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APPENDICES

APPENDIX A

Judgment of the United States Court of Appeals, for the District of Columbia Circuit in *American Institute For Shippers' Associations, Inc., et al.*, v. *United States of America et. al.*, No. 76-1005, entered February 24, 1977.

NOT TO BE PUBLISHED—SEE LOCAL RULE 8(f)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1976

No. 76-1005

[Filed Feb. 24, 1977, George A. Fisher Clerk]

AMERICAN INSTITUTE FOR SHIPPERS' ASSOCIATIONS, INC., *et al.*,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,
Respondents

FREIGHT FORWARDERS INSTITUTE,

Intervenor

Petition for Review of an Order of the Interstate Commerce Commission

Before: WRIGHT, LEVENTHAL, and WILKEY, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the Interstate Commerce Commission and was argued by counsel.

For the reasons stated in the attached memorandum, it is

ORDERED and ADJUDGED by this court that the order of the Interstate Commerce Commission sought to be reviewed herein is hereby affirmed.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX B

Memorandum Opinion of the United States Court of Appeals for the District of Columbia Circuit in *American Institute for Shippers' Association, Inc., et. al. v. United States, et. al.* No. 76-1005, entered February 24, 1977.

MEMORANDUM

We think this is an appropriate case to defer to the Commission's understanding of the act which it administers. The position it has taken here—that *bona fide* shippers' association may not have other shippers' associations as members—is consistent with Section 402(c) of the Interstate Commerce Act, 49 U.S.C. § 1002(c) (1970), which states that the freight forwarder provisions of the Act shall not apply to "the operations of a shipper, or a group or association of shippers." Nothing in this language suggests that Congress contemplated associations of associations of shippers. This is not itself dispositive, however, because Section 402(c) only clarifies the definition of freight forwarder set out in Section 402 (a) of the Act, 49 U.S.C. § 1002(a) (1970). Nonetheless, we think the Commission's interpretation is reasonable given the following factors: (1) the Commission's representation that administration of the freight forwarder provisions of the Act wil be hampered if shippers' associations are allowed to have other associations as members; (2) its further representation that petitioner Sunshine State can bring itself into compliance with the outstanding cease-and-desist order simply by enrolling the members of its member associations as members of Sunshine itself; (3) its assurance at oral argument that nothing would prevent members of, *e.g.*, petitioner New Jersey Shippers Polling Association, from appointing the director of New Jersey Shippers as their agent to oversee

their interests in Sunshine State once those members were also direct members of Sunshine; and (4) a line between freight forwarders and shippers associations must be drawn somewhere, and the function of line-drawing is normally one left to the sound discretion and expertise of the agency.

Thus, although we might not choose the interpretation of Section 402 proposed by the Commission were we to address the matter in the first instance, we cannot say that the Commission has acted unreasonably in interpreting its statutory mandate, given the limited impact of the interpretation chosen on the right of shippers and the consistency of that interpretation with the language of Section 402. *See Bayside Enterprises, Inc.* v. *NLRB*, —— U.S. ——, ——, 45 U.S. L. WEEK 4086, 4087 (Jan. 11, 1977). For this reason, the order of the Commission is

Affirmed.

APPENDIX C

Statutes Involved

49 U.S.C. § 1002(a)(5)

The term "freight forwarder" means any person which (otherwise than as a carrier subject to chapters 1, 8, or 12 of this title) holds itself out to the general public as a common carrier to transport or provide transportation of property, or any class or classes of property, for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carrier subject to chapters 1, 8, or 12 of this title.

• • • •

49 U.S.C. § 1002(c)(1)

The provisions of this chapter shall not be construed to apply (1) to the operations of a shipper, or a group or association of shippers, in consolidating or distributing freight for themselves or for the members thereof, on a nonprofit basis, for the purpose of securing the benefits of carload, truckload, or other volume rates . . . .

5 U.S.C. § 558(c)

. . . the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institu-

tion of agency proceedings therefor, the licensee has been given—

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements

• • • •

5 U.S.C. § 551(8)

"license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission.

Supreme Court, U. S.
FILED
JUN 3 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1653

AMERICAN INSTITUTE FOR SHIPPERS' ASSOCIATIONS, INC.,
HARRY DEMONTMOLLIN,
FLORIDA ALL STATE CONSOLIDATORS, INC.,
NEW JERSEY SHIPPERS POOLING ASSOCIATION, INC.,
and
SUNSHINE STATE SHIPPERS AND
RECEIVERS ASSOCIATION, INC.,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION
and
UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL APPENDIX

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D.C. 20001

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No. FFC-50 Service Date Sep. 18, 1974

[SEAL]

INTERSTATE COMMERCE COMMISSION

Certificate of Service

The SECRETARY of the Interstate Commerce Commission hereby certifies that the attached initial decision of the Administrative Law Judge has been filed with and duly made part of the record herein and has this date been served upon all known parties in the manner provided by law and the regulations of this Commission.

Exceptions to said decision, if any, must be filed with the Secretary, INTERSTATE COMMERCE COMMISSION, Washington, D.C. 20423, and served on all other parties of record within 30 calendar days (20 days if there are no other parties) from the date of service shown above. Replies thereto may be filed within 20 calendar days after the final date for filing exceptions. If either date falls upon a Saturday, Sunday, or legal holiday, then the applicable pleading must be filed by the end of the next business day.

If no exceptions are filed to the initial decision, and it is not stayed by the Commission, the initial decision becomes the order of the Commission by operation of law upon expiration of the period for filing of exceptions. The parties to this proceeding are warned that it should not be assumed that the initial decision has become effective as the order of the Commission by operation of law until a notice to that effect has been received.

In addition, any new operation to be authorized by the initial decision, if it becomes the order of the Commission by operation of law, may not be commenced until a certificate, permit, or license, as the case may be, has ac-

tually been issued by the Commission. A certificate, permit, or license will not be issued until the applicant has complied with the provisions of the Interstate Commerce Act and the requirements of the Commission thereunder as specifically set forth in the initial decision.

/s/ Robert L. Oswald
ROBERT L. OSWALD
Secretary

[SEAL]

INTERSTATE COMMERCE COMMISSION

INITIAL DECISION

No. FF-C-50

SUNSHINE STATE SHIPPERS AND RECEIVERS ASSOCIATION, INC., ET AL.—INVESTIGATION OF OPERATIONS

Respondent Sunshine State Shippers and Receivers Association, Inc., found not to be a bona fide shippers association within the meaning of section 402(c)(1). Changes ordered.

Ronald N. Cobert, *O. C. Beakes*, and *Robert DeKroyft* for respondents and intervenors in support of respondents. *J. Preston Proffitt, Jr.*, *Edward W. Arnn*, and *John J. Charuhas* for the Bureau of Enforcement. *L. Agnew Myers, Jr.*, *Richard J. Riddick*, and *S. S. Eisen* for intervenors in support of the Bureau.

By William J. Gibbons, Administrative Law Judge:

By order of January 29, 1973, the Commission instituted an investigation, on its own motion, under authority of section 403(f) of the Interstate Commerce Act (Act), and section 2 of the Elkins Act concerning the operations of Sunshine State Shippers and Receivers Association, Inc. (Sunshine) to determine whether it has been and is engaging in services as a freight forwarder in violation of section 410(a) of the Act, and whether Harry deMontmollin (deMontmollin) and Florida All State Consolidators, Inc. (FASCO) have been and are

participating in the violations, and for the purpose of issuing such orders and taking such further action as the facts and circumstances may warrant. The order named Sunshine, deMontmollin and FASCO as respondents and directed the Commission's Bureau of Enforcement (Bureau) to participate as a party in the proceeding.

The proceeding was referred to the undersigned Administrative Law Judge for hearing and initial decision thereon. Hearings were held in Jacksonville, Fla. on December 17, 18 and 19, 1973 and in Washington, D.C. on February 19, 20, 21 and 22, 1974. Briefs have been filed.

The Florida-Texas Freight, Inc. (Florida-Texas), Universal Carloading and Distributing Co., and the Freight Forwarders Institute, Inc., intervened in support of the Bureau, and the American Institute of Shippers' Associations, Inc., and New Jersey Shippers Pooling Association, Inc. (New Jersey Association) intervened in support of respondents. Evidence was presented by the Bureau, by the intervenors in support of the Bureau and by respondents.

By letter dated February 21, 1973, the Bureau notified the respondents, as required by section 554 of the Administrative Procedure Act, 5 U.S.C. 554, of the specific matters of fact and law that it would assert against the respondents at the hearing. In this letter, the Bureau contended that Sunshine, under the direction and control of deMontmollin, is engaging in services as a freight forwarder without a permit authorizing such operations in violation of the provisions of Part IV of the Act, that deMontmollin and FASCO have participated in said violations, and that a cease and desist order should be issued requiring the respondents to comply with the Act.

At the beginning of the hearing, respondents made a motion to dismiss the investigation, which was renewed on brief, arguing that the Commission failed, prior to the institution of the proceeding, to notify the respondents of the alleged illegality, and that such failure constitutes an error of law. In support of the motion, respondents cite section 558(c) of the Administrative Procedure Act requiring notice in writing, prior to the institution of a proceeding, of the facts or conduct which may warrant the action and an opportunity to demonstrate or achieve compliance with all lawful requirements. They argue that the requirements of section 558(c) are jurisdictional, and since the Commission failed to observe those requirements, it is in direct violation of the Administrative Procedure Act and only "outright dismissal can remedy the situation." The undersigned is of the opinion that the Bureau's letter of February 21, 1973, satisfies the notice requirement of section 558(c) of the Administrative Procedure Act. However, the record shows that neither Sunshine nor the other respondents herein, individually or collectively, were afforded an opportunity to demonstrate or achieve compliance with all lawful requirements. It does not appear, however, that such failure is a jurisdictional matter that deprives the Commission of its investigatory powers. Since the Commission possesses broad powers under the Act to investigate any matter under its jurisdiction, and since the hearing is in furtherance of its investigatory functions, there appears to be no basis for dismissing the proceeding on jurisdictional grounds.

In fairness to respondents, however, the Administrative Law Judge is of the opinion that respondents should be afforded a reasonable opportunity to achieve compliance with the provisions of section 402(c)(1) of the Act before the Commission reaches a final decision. This

opinion is based upon the following considerations: (1) there was complete cooperation between the officers of Sunshine and the investigators during the course of the investigation, (2) fair play demands it, (3) Sunshine was in existence for less than a year when the investigation began, and (4) Sunshine's defects are not of such a serious nature that they cannot be corrected.

Background

Sunshine was incorporated in the state of Delaware on March 9, 1971 as a non-profit corporation, and on March 16, 1971, it filed its articles of incorporation in the state of Florida. Its incorporators were O. C. Beakes, B. Kemp Haskell and R. M. Simons of Jacksonville, Fla., and its principal place of business is at 600 Field Avenue, Jacksonville.[1] Its principal function is the receipt of carload shipments from northern origin points, the breaking of these shipments in Jacksonville, the delivery of local shipments in Jacksonville; the consolidation, forwarding and delivery of shipments to other points in Florida. Sunshine neither owns nor operates any motor vehicle equipment and is not involved physically in the handling of freight. It holds no authority from this Commission.

Immediately prior to the incorporation of Sunshine, Messrs. H. C. Bailey, Jr., D. J. Lanahan, Watson Ramsey, Jr., Wallace B. Covington, and L. B. Wright, all Jacksonville businessmen, signed a pre-incorporation agreement, in which it was stated that the parties desired to create a shippers association within the purview of section 402(c) of the Act for their benefit and for the benefit of others similarly situated, and each party

[1] Mr. Beakes, an attorney for Sunshine, drafted the certificate of incorporation, patterning it after the articles of incorporation of the New Jersey Association. He became Sunshine's first secretary and still holds that position.

agreed to lend the association the sum of $300. The loans were to be repaid from funds generated by operation of the association, and the lenders were given promissory notes with interest at 10 percent. Checks representing the loans were made out to O. C. Beakes, Special Account, Sunshine State Shippers and Receivers Association, Inc.[2] All of the loans have been repaid.

Sunshine's certificate of incorporation recites that its purposes are, on a non-profit basis, to assemble and consolidate or to arrange for the assembly or consolidation, for its members, of less-than-carload and less-than-truck-load freight into carload, truckload and other quantity lots, and to arrange thereafter for the shipment of such carload, truckload or any other quantity lots, over the lines of common or other carriers to Jacksonville, Fla., or other points within the state of Florida, or elsewhere as the board of directors may, from time to time determine, and at such point or points of destination to break-bulk and distribute, or arrange for the break-bulk and distribution of such shipments to the members of Sunshine or others at the direction of such members. The further stated purpose of Sunshine is to provide, for the mutual benefit of its members, an advisory traffic service for the solution of their transportation problems and to assist members as shippers and/or receivers of freight to consolidate and distribute their freight on a non-profit basis for the purpose of securing the benefit of carload, truckload or other volume rates within the purview of the Interstate Commerce Act, Part IV, section 402(c). The certificate further states that Sunshine is not organized to transport or to provide for the transportation of shipments as a common carrier or otherwise, nor to assume liability for the transportation of such shipments as a common carrier or otherwise.

[2] All parties to this agreement, except one, made the loans.

Also, the certificate provides that the activities and affairs of the corporation are to be governed by a board of directors, the number of directors to be fixed by the by-laws, but in no case shall the number be less than three. There is a further provision that the directors shall be elected by the members at the corporation's annual meetings, but the directors need not be members of the corporation unless required by its by-laws. The certificate further provides that the corporation may elect such officers as the by-laws may specify, who shall have such titles and exercise such duties as the by-laws may provide. Another provision in the certificate of incorporation is that Sunshine shall not have any capital stock and no profits shall be made or dividends declared to members of the corporation or to any one else.

Among other things, the by-laws of Sunshine restates its purposes and functions, sets forth the requirements for membership, sets the membership fee of $10 annually, provides for annual and special meetings and notice of the time, place and purpose of meetings, and for the voting rights of members and the requirement of the majority rule. Other provisions of the by-laws relate to the number, eligibility and terms of office of directors, the filling of vacancies on the board, requirements as to board meetings, the appointment of officers and their duties, and the operations of Sunshine.

With respect to membership requirements, the by-laws provide that membership shall be open to responsible individuals, partnerships, companies, corporations and other firms and organizations (1) whose business requires the shipment of goods or merchandise in interstate commerce, either as retailers, jobbers, wholesalers or manufacturers; and (2) whose goods or merchandise to be shipped and the nature of the shipments to be made

lend themselves to the consolidation with shipments of the membership in general of this corporation.[3]

As to the directors, the by-laws provide that the operations and properties of the corporation shall be managed and controlled by six directors, each of whom shall be a member or representative of a member of the corporation and, except for the first board of directors, the number may be fixed from time to time by the board of directors or members. Regular meetings of directors are to be held quarterly or at such other intervals as may be determined by the board, and meetings of directors may be held at any place that the board may from time to time determine. In setting forth powers and responsibilities of the directors in conducting and managing the affairs of the corporation, the by-laws provide that the directors shall appoint all corporate officers, including an Executive Secretary, and local agents at points of collection and distribution of freight. Directors are to serve without compensation.

The by-laws specify the corporate officers, including an Executive Secretary, to be selected by the directors and prescribe their terms of office and duties. The by-laws state that the Executive Secretary, subject to the continuing supervision and control of the board of directors, shall (1) supervise and manage all the day-to-day operations and affairs of the Association, (2) prepare cost studies, (3) promptly inform members and directors of changes, extensions, improvements and reductions of operations, or any other changes affecting the corporation, (4) keep a correct list of the names and addresses of the members of the corporation, (5) attend all meet-

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[3] As will be discussed elsewhere in this decision, Article 3.1 of the by-laws amended on or about February 6, 1974, by deleting the words, "either as retailers, jobbers, wholesalers or manufacturers." It was thought that this would eliminate any doubt as to the propriety of other shippers associations joining Sunshine.

ings of members and the board of directors, (6) keep a Minute Book of such meetings and transactions, (7) keep custody of all corporation records, (8) prepare and send out all meeting notices, (9) with the advice and assistance of the Treasurer, by March 31st of each year, have prepared by a Certified Public Accountant or Public Accountant, and submit to the membership a financial report for the calendar year ended the previous December 31st: and, at the request of the board of directors, prepare and submit to the board such interim financial reports as the board may request, and (10) have such other powers and perform such other duties pertaining to his office as may be required by the board of directors.

The by-laws further provide that the Executive Secretary can hold any office in the corporation other than President or Vice-President, and may be a director if he is a member or representative of a member of Sunshine. Also, the Executive Secretary is to hold office at the pleasure of the board of directors and may be removed at any time by vote of a majority of the directors.

The by-laws provide for the promulgation of rules by the board of directors relating to the conduct of the business of Sunshine, including rates to be charged, regulation of pick-up and delivery, handling of freight bills, payment of charges, extension of credit and other matters. According to the by-laws the guiding principle for all operations of Sunshine is that all charges to members shall, to the extent possible, equal all costs and expenses of operations so as to come out to zero. Under the by-laws, Sunshine is not responsible for loss or damage to shipments; members agree that they will not assert any claim against Sunshine for any loss or damage, but Sunshine or its agent or employees will file claims on behalf of the member involved against the

party or parties responsible and will make every effort to collect or recover for a member. Also, Sunshine is not required to carry insurance beyond that necessary to cover legal liability in respect to its operations as a non-profit corporation. The by-laws were adopted by the incorporators on or about May 6, 1971.

On May 6, 1971, the first meeting of Sunshine was held pursuant to waiver of notice. The following members were present and were elected to the board of directors: R. P. Wright, Barry W. Covington, D. J. Lanahan, Charles O'Leary, H. C. Bailey, Jr., and B. Arthur Carolan. None is a shipper-member or a representative of a shipper-member, except Wright and Carolan. Immediately following the membership meeting on May 6, 1971, the directors, with Lanahan presiding, held a meeting and elected the following slate of officers: R. P. Wright, President; Charles O'Leary, Vice-President; O. C. Beakes, Secretary; H. C. Bailey, Jr., Treasurer; Harry deMontmollin, Executive Secretary.

At a meeting held on February 8, 1972, the following were elected directors: R. P. Wright, H. C. Bailey, Jr., B. Arthur Carolan, Barry W. Covington, Harry Bradt, J. L. Peters, and Robert DeKroyft. Three of these represent other shippers associations who claim membership in Sunshine, two represent members who do not use the facilities of Sunshine and two represent shipper-members of Sunshine. Appendices 1 and 2 reflect the membership roster of Sunshine on April 24, 1972 and January 31, 1974, respectively, showing an increase from 19 to 27 members during that period. As of April 24, 1972, five shippers associations claimed membership in Sunshine and as of January 31, 1974, eight shippers associations claimed membership therein.

At the May 1971 meeting, the compensation for the Executive Secretary was fixed at 15¢ per hundred weight

of freight handled with a guaranteed draw of $250.00 a week, and the directors authorized him to negotiate a lease for Sunshine's operations, and to obligate Sunshine to pay the normal rent, telephone, utilities, postage and printing. Also, the officers were instructed to negotiate a contract for deMontmollin's services.

deMontmollin has served continuously as Sunshine's Executive Secretary since May, 1971. On December 7, 1971, Sunshine and deMontmollin entered into a contract, effective as of May 1, 1971, covering the latter's services as Executive Secretary, stating, among other things, that deMontmollin is skilled in the surface transportation of freight and that Sunshine has need for him to advise, assist, manage and direct the transportation of the freight of its members. His compensation was reaffirmed with a minimum of $250.00 a week, except that in computing the 15¢ per hundred weight, volume shipments are excluded. In the contract, deMontmollin was referred to as a contractor and Executive Secretary, and his duties were defined as supervising Sunshine's activities in the movement of freight for its members under the direction of the officers and directors of Sunshine, to make reports to the officers and directors, and to attend membership meetings when requested. By its terms, the contract expired on May 1, 1972. deMontmollin continues to serve as Executive Secretary under an oral understanding with the officers of Sunshine. During 1973, his total compensation was about $34,000.

The physical operations incident to the handling of freight at Jacksonville are conducted by FASCO pursuant to a contract entered into between Sunshine and FASCO on December 7, 1971, effective as of May 1, 1971. FASCO is owned by Raymond G. Mullady, Peter Yovich and Robert DeKroyft. The latter owns Rapid Assembly Agency, Inc. of Newark, N.J., and is now an honorary director of Sunshine.

In effect, FASCO acts as a drayage agent for Sunshine at Jacksonville. FASCO performs the trailer stripping and other break-bulk operations at Jacksonville, the reconsolidation of traffic into trailer loads, the delivery of such consolidated trailer loads to the railroad for subsequent movement to other points in Florida, and, in addition, it handles cartage operations in the delivery of freight destined to points within the Jacksonville Commercial Zone. Freight moving beyond Jacksonville is transported by common carrier, mostly via rail, either directly to consignees or to cartage companies for ultimate delivery to the various consignees. Some moves by motor vehicle in less-truck-load lots. In the Jacksonville terminal area, FASCO makes the following charges: pick-up and delivery in the terminal area, 50¢ per hundred weight with a minimum of $3.00; unloading and segregating in and from boxcar or trailer, 35¢ per hundred weight; consolidation charge for outbound shipment, 23¢ per hundred weight; solid load delivery within terminal area, 15¢ per hundred weight with a $45.00 minimum; trailer pick-up and return, $15.00 per trailer; terminal charge for handling trailers beyond Jacksonville, $5.00; and cutting bills of lading, if required, 25¢ per bill. FASCO holds no operating authority from this Commission.[4]

The contract between FASCO and Sunshine provides that the contract is terminable by either party upon 30 days written notice in writing, and that either party may enter into other contracts for or to provide for pick-up and delivery service within the Jacksonville terminal area.

The evidence summarized above, concerning which there appears to be no dispute, was presented in part by the Bureau, and in part by the respondents. Both

[4] Some of these charges were increased in 1974.

the Bureau and respondents, as well as the freight forwarder interests, presented evidence of a conflicting nature, both as the facts and the interpretations or inferences to be drawn therefrom. The Bureau presented seven witnesses, Florida-Texas presented two witnesses in support of the Bureau, and the respondents, three witnesses in rebuttal. In view of these conflicts, the undersigned deems it necessary to set forth the evidence of the respective parties in some detail.

The Bureau's Evidence

The Bureau's principal witness was Willis E. Johnson, the Commission's District Supervisor, Atlanta, Ga., who, together with District Supervisor, Herman Fauss of Jacksonville, Fla., conducted an investigation into respondent's activities during the period April, 1972 to July, 1972.[5] Among other things, witness Johnson testified that Sunshine's certificate of incorporation prohibits the distribution of dividends; that neither dividends nor refunds have been paid to Sunshine's members.[6] Witness Johnson further testified that as of April 24, 1972, there were 19 members listed on Sunshine's membership roster, that one of the members listed, namely, Industrial Office Supplier's, Inc., was not in fact, a member, that five of the members of Sunshine are other shippers associations, and that four representatives of such associations are directors of Sunshine.

Witness Johnson stated that other shippers associations are not eligible for membership in Sunshine because Sunshine's by-laws limit membership to retailers, jobbers,

[5] As will be set forth later herein, the investigation appears to have been prompted by a complaint of Florida-Texas, a freight forwarder.

[6] Witness Johnson was permitted to testify over objection of respondents' counsel, who claimed that he needed a specific directive from the Commission.

wholesalers, and manufacturers' and that shippers associations do not fall in any of those categories. As against this, respondents contend, and presented evidence to show, that the organizers of Sunshine intended from the beginning to make membership in Sunshine available to other shippers associations, and that it was never the intention of the board of directors, by definition of membership eligibility in the by-laws, to preclude membership of other shippers associations in Sunshine. On or about February 6, 1974, the by-laws were amended by deleting therefrom the words "retailers, jobbers, wholesalers, or manufacturers." By this amendment, respondents contend, the eligibility requirements for membership are sufficiently broad to permit membership by shippers associations.

Witness Johnson further testified that deMontmollin, who became Sunshine's Executive Secretary, had been employed for some 30 years in the freight forwarder industry, and that he had organized and set up Sunshine. He testified further that deMontmollin contacted and made arrangements with various cartage companies for the delivery of shipments at Florida points beyond Jacksonville; that deMontmollin put together or published a schedule of rates covering less-than-truckload freight from Jacksonville to other Florida points; that deMontmollin has one or two part-time employees in his office whose compensation is paid by deMontmollin rather than by Sunshine.

With respect to FASCO, witness Johnson stated that FASCO is owned by Richard Mullady, Peter Yovich and Robert DeKroyft, that DeKroyft owns Rapid Assembly, Inc., a consolidation operation of Newark, N. J., that DeKroyft is Executive Secretary of New Jersey Shippers Pooling Association and is a director of Sunshine; that FASCO holds no authority from this Commission.

According to witness Johnson, the relationship between FASCO and Sunshine is determined by the December 7, 1971 contract, hereinbefore referred to, providing for FASCO handling pick-up and delivery service, break-bulk and consolidation operations on behalf of Sunshine for compensation based on hundredweight and trailer loads. With specific reference to the method of operation, witness Johnson testified that shipments (trailers or box-cars made up of freight of various shippers and shipper association members) orginating principally in the east and midwest, are consigned to Sunshine at Jacksonville. Most of the shipments studied arrived in Jacksonville via rail. At this point, FASCO strips the trailers and recon-solidates the freight into trailers provided by Seaboard Coast Line Railroad. The trailers are then moved by piggyback rail service or by motor common carrier from Jacksonville and consigned to various cartage agents at such Florida points as Hialeah, Orlando and Tampa for ultimate delivery. As to freight destined to the Jackson-ville Commercial Zone, FASCO makes delivery. On re-consolidated shipments moving outbound from Jackson-ville to other Florida points, Sunshine is listed as the consignor on all bills of lading, and as consignee on in-bound shipments.

Witness Johnson presented shipping documents of 20 representative shipments covering in excess of 100 ship-ments handled by Sunshine and/or FASCO in January, 1972. For the most part, shipments coming into Jack-sonville are prepaid. On outbound shipments from Jack-sonville, Sunshine pays the freight charges for the trans-portation, as well as the delivery charges of the various cartage companies, and Sunshine then bills the total transportation charges back to its shipper members. In addition, Sunshine bills its shipper-members a nominal charge of $5.00 a shipment for its service.

On cross-examination, witness Johnson conceded that deMontmollin may have set up the physical operations of Sunshine rather than organizing it, and that Messrs. Wright and Carolan, shipper-members of Sunshine, were the organizers and original board members of Sunshine. Also, the witness stated on cross-examination that de-Montmollin was not present at the organizers' meeting of March 19, 1971, or at either the members' meeting or the directors' meeting of May 6, 1971. Witness Johnson admited that there had been no serious violations by Sunshine of its own by-laws, and with respect to the initial funding of Sunshine, he conceded that interest-bearing loans had been repaid.

The remaining six witnesses for the Bureau, all of whom testified pursuant to subpoenas, are affiliated with Sun-shine either as members, organizers or officers. Among these is respondent deMontmollin, who, in response to a question as to who had "the original idea to form this association," testified that he had a meeting in January, 1971 with Messrs. Wright, Carolan and DeKroyft, that they related to him "their ideas in connection with a shippers association," that he (deMontmollin) was em-ployed at that time, and that he was asked during the meeting whether he would be interested in "running" it (Sunshine); that he assumed his duties as Executive Secretary in May, 1971; that his contract of employment of December 7, 1971, retroactive to May 1, 1971, has expired, but that he continues to work for Sunshine "on a week-to-week basis."

He further testified that he did not know who prepared Sunshine's corporate charter and that he had nothing to do with the negotiation of the contract between Sunshine and FASCO; that he has no knowledge of how member-ship was solicited or who contacted prospective members, but that he made some contact and did "some leg work" in connection with the possible interest of members on

instructions from Messrs. Wright and Beakes; that Sunshine's arrangements with cartage companies for distribution in Hialeah, Tampa and Orlando were made by Sunshine's board after his discussions with the cartage companies; and that on consolidated shipments out of Jacksonville, FASCO makes the arrangements and handles all the paper work incident thereto, and Sunshine receives copies of all documents relating to inbound and outbound freight.

In describing his duties as Executive Secretary, deMontmollin stated that he is responsible for Sunshine's day-to-day operations; provides tracing, rating and other incidental services; maintains a record of accounts receivable and accounts payable, and bills charges to members in accordance with instructions from the board. He further testified that he prepares rate information pursuant to instructions from the board, that he makes no computations, makes no determinations and makes no recommendations, but simply reports to the board; further, on instructions from the board, he files claims against line-haul and delivering carriers in the name of the beneficial owners of the traffic involved, and takes care of routine correspondence, including notice of meetings, the furnishing of rate information and financial reports to members. In addition to his position with Sunshine, deMontmollin acts as a transportation consultant for others, for which he receives compensation. Except for the Executive Secretary, the witness stated no other officer or director of Sunshine receives compensation from Sunshine. Sunshine has a checking account and all checks must bear any two signatures from among the Executive Secretary, Secretary and Treasurer. With respect to FASCO, the witness testified that it follows a routing guide as to those shipments reconsolidated for movement beyond Jacksonville.

Throughout deMontmollin's presentation, he emphasized that outside of his general supervisory duties with Sunshine and his conduct of its day-to-day operations with respect to the movement of traffic, his duties and responsibilities are only those specifically authorized by Sunshine's board and delegated to him by Sunshine's president. He indicated that he saw nothing unusual in the fact of Sunshine having officers and directors who are non-shippers, and he admitted that several members of Sunshine are, in fact, other shippers associations. In his opinion, the physical operations of a shippers association are exactly the same as those of a freight forwarder.

William C. German, who is President and Chairman of the Board of Perdue Office Furniture Co. of Jacksonville, testified that he became a member of Sunshine in early 1971 following discussions with Robert Wright. He indicated that he had no discussion with deMontmollin concerning membership. He testified that he filed a written application for membership, paid a $10.00 membership fee, and was notified of his acceptance as a member by Mr. Beakes. Since then, he has been supplied with a membership list, a copy of Sunshine's by-laws and information concerning freight charges. In response to a question as to why he joined Sunshine, witness German testified that at the time his company was in the process of making some changes with one of its major suppliers in Michigan and he thought that by joining the association he could possibly route some traffic into Jacksonville via Sunshine.

German testified further that he was neither an officer nor director of Sunshine at any time. Although he never attended a meeting of Sunshine, he receives notices of meetings and believes that he has the right to inspect the books and records of Sunshine if he so desires. In a general way, he is familiar with the activities of Sunshine, but has little knowledge of the latter's contract with

FASCO or with deMontmollin, and is unfamiliar with Sunshine's rental arrangements and with the details of its operations.

Barry W. Covington, Jr., Vice-President of Ace Electric Supply Co. of Jacksonville, testified that his company became a charter member of Sunshine on the basis of a written application, that his company had loaned $300 to Sunshine at the beginning of its operation, that such loan has been repaid, and that deMontmollin did not solicit the membership of his company. He further testified that he served as a director of Sunshine from May, 1971 through September, 1972, that during such period, he had regularly attended directors' meetings, as well as the initial membership meeting and that he is familiar with the contracts between Sunshine and FASCO and between Sunshine and deMontmollin. He further testified that as a member of Sunshine, his company used the services of FASCO and Sunshine with respect to inbound shipments.[7] He further indicated that as a member of Sunshine, his company would share any loss incurred by Sunshine if the board so decided. As to the future use of Sunshine by Ace Electric Supply Co., Covington testified that it was his intention to use Sunshine with respect to both inbound and outbound shipments and for the purpose of improving the capabilities of the Jacksonville community.

H. C. Bailey, Jr., President of C & B Salvage Co., testified that his company was one of the original members of Sunshine, that the initial contact between Sunshine and his company was made by Robert Wright, not by deMontmollin, that as an original member of Sunshine, C & B Salvage loaned $300 to Sunshine in early 1971, and that the loan has been repaid. Bailey further

[7] On the basis of questions brought out on cross-examination and other testimony of record, there is considerable doubt as to whether Covington's company used the services of Sunshine.

testified that he became a director and was elected Treasurer of Sunshine and that he continues to hold those positions. He stated that the purpose of joining Sunshine was that he thought that his company would benefit by receiving shipments from western and northern states. He testified that he receives notices of all directors' meetings, that meetings are held every quarter and that he has attended most of the directors' meetings. He indicated that he is familiar with the contracts between Sunshine and deMontmollin and between Sunshine and FASCO. With respect to participation in Sunshine's financial losses, he indicated that the matter would be one for determination by the directors. He further testified that he has received information relating to the charges to be made for Sunshine's services and that his company used the services of Sunshine's with respect to traffic moving to C & B Salvage at Jacksonville.[8] With respect to local cartage companies, Bailey testified that Robert Wright, as president of Sunshine, and not deMontmollin, made contacts and established the relationship between Sunshine and such cartage companies. He also testified that the board of directors votes upon and approves members, and that the board has the power to control and actually controls deMontmollin.

Marion W. Grant, Secretary of Industrial Office Suppliers, Inc. of Jacksonville, testified that his company has never been a member of Sunshine and never used its facilities. However, Watson Ramsey, a stockholder and Chairman of the Board of Industrial Office Suppliers, served as one of the organizers of Sunshine and was party to the pre-incorporation agreement. Although it appears that Industrial Office Suppliers, Inc. was never a dues-paying member in Sunshine, Ramsey's interest in Sun-

[8] In the case of C & B Salvage, there is also doubt whether it used Sunshine's services.

shine explains the reason for Industrial Office Suppliers being listed as a member of Sunshine.

Dennis J. Lanahan, President of Lanahan Lumber Co. of Jacksonville, testified that he was one of the founders of Sunshine, that he had loaned Sunshine $300, and that he had submitted an application for membership. In regard to his interest in Sunshine, witness Lanahan stated that he first discussed the matter with Beakes and thought it was a good thing for his company and for the city of Jacksonville. Witness Lanahan testified that throughout his membership in Sunshine he has been furnished with membership lists, by-laws and information as to charges. He testified that he attended meetings in the past, but that due to the press of other business, he is no longer a member of Sunshine's board of directors and presently holds no office in Sunshine. Although Lanahan has not used the services of Sunshine in the past, he has hopes that he might use it in the future. His contemplated future use of Sunshine would be outbound from Jacksonville to the north. It was his general understanding that the officers of Sunshine, rather than the directors, supervise and direct its operations. He stated that he relied on deMontmollin to (1) establish a rate level, (2) set up the cartage companies, and (3) arrange for the consolidations.

Evidence of Intervenors
In Support of Bureau

Edward N. Kee, Regional Manager of Operations for Florida-Texas in Jacksonville,[9] testified that he is charged with the responsibility for the solicitation of new accounts and for handling and investigating complaints. Witness Kee testified that he became aware of the existence of Sunshine through information supplied by his company's

[9] Florida-Texas is a regulated freight forwarder.

Orlando manager, Walter Price, in August, 1971. Witness Kee stated that he forwarded information concerning Sunshine to Morris Krathen, President of Florida-Texas, who instructed Kee to pursue the matter further. Thereupon, Kee requested Price to conduct an investigation of Sunshine's operations into Orlando. As a result of this investigation, certain data were assembled showing shipments handled by Sunshine for its members, trailer loads, originating at numerous points in the United States, consigned to Sunshine in Jacksonville, broken down at Jacksonville and reconsolidated and shipped to Orlando. After this preliminary investigation, witness Kee contacted representatives of Republic Carloading and Distributing Co. and Universal Carloading, both freight forwarders, for the purpose of interesting them in the investigation of Sunshine. With such data, Kee and Robert Smith of Republic Carloading and Distributing Co. met with a representative of the Commission and turned over their material. Kee sponsored an exhibit purporting to show the loss of traffic suffered by Florida-Texas as the result of Sunshine's operations. As reflected in this exhibit, the diversion study covered a period from August, 1972 to August, 1973 and reflected 17 shipments, 32,192 pounds and revenue loss of $1,437. Witness Kee admitted that he did not know to whom the traffic was actually lost, but that much of it was traffic which Florida-Texas previously enjoyed.

Morris Krathen, President of Florida-Texas, stated that he believed there was some question as to the propriety of Sunshine's operations, and he therefore referred the matter to counsel. As to the business of Florida-Texas, Krathen stated that about 85 percent of all traffic originating in its origin area was destined to Florida, and that his company's authority was inbound or southbound only. He outlined the regulatory controls imposed upon freight forwarders and emphasized the costs at-

tributable to freight forwarders as compared with unregulated shippers associations, estimating that in 1973, 4 percent of his company's total revenues or $513,000 was attributable to compliance costs. He expressed the view that it would constitute an unfair competitive advantage for a shippers association to receive traffic from other shippers associations. Among other things, witness Krathen stated that 2 percent of a freight forwarder's gross revenue must be set aside to provide for the settlement of claims, and that no such requirement is imposed upon Sunshine. As to the specific operations conducted by Florida-Texas, Krathen testified that pick-up, delivery and transfer operations purchased with respect to local commercial zone operations for the first three periods of 1973 amounted to an excess of $3.3 million. It was developed that the physical operations for Florida-Texas are conducted by wholly-owned subsidiaries, Freightex Cartage, Inc. and Freightex, Inc. During 1973, the gross revenues of Freightex, Inc. exceeded $1 million and that of Freightex Cartage, $1.4 million, most of which is derived from Florida-Texas.

Evidence of Respondents

O. C. Beakes, Secretary and General Counsel of Sunshine, who has been practicing law for 35 years, testified that he prepared the pre-incorporation agreement and the certificate of incorporation, and that he maintains the minutes of directors' meetings as part of his duties. Witness Beakes further testified that each pre-incorporator was to loan $300 to Sunshine, that he received that sum from all but one of the parties, and that the loans were subsequently repaid with interest. In describing his initial contact with Sunshine, Beakes testified that he was initially contacted by deMontmollin, who represented to Beakes that he was acting pursuant to instructions of Robert Wright, one of the originators of Sunshine. Thereafter, Beakes' contacts were through H. C. Bailey. Beakes stated that pre-incorporators included leading citizens of Jacksonville, as well as shippers operating in the area. According to Beakes, all of these persons are outstanding citizens well known in Jacksonville and independently wealthy. Beakes testified that he attends directors' meetings, that the meetings are entirely of a business nature, that the by-laws are observed in every detail and that minutes of the meetings are kept and submitted to the President for his approval.

On cross-examination, witness Beakes restated that deMontmollin contacted him concerning Sunshine, but that the latter was representing those parties who "were thinking about getting together a shippers association with other people. * * *" Witness Beakes testified that it was not his responsibility to contact members of the association, but stated that those activities were conducted by Wright and Bailey. Beakes also testified that deMontmollin attended board meetings, but only at the invitation of the board. With specific reference to the first meeting of the association on May 6, 1971, Beakes testified that there were only six members, that those members were named directors and officers at the same meeting. Beakes further testified that he prepared the incorporation papers for FASCO, which was formed three or four years prior to Sunshine. In addition, as general counsel for Sunshine, he participated in the preparation of the contract between Sunshine and FASCO. As to DeKroyft's selection as a director, witness Beakes testified that DeKroyft's status was intended to be that of a honorary director on a non-voting basis and was so understood by the directors and members of the association. Also, witness Beakes testified that the by-laws of Sunshine were recently amended by deleting therefrom the words "retailers, jobbers, wholesalers and manufacturers." By this amendment, Beakes testified that while it

was understood by all members that shippers associations would be eligible to join Sunshine, the amendments in the by-laws would eliminate any doubt concerning the matter.

Bernard A. Carolan, Distribution Manager for Henry Heidi, Inc., a candy manufacturer located in New Brunswick, N. J., and a member of Sunshine, is Chairman of the Board of New Jersey Shippers Pooling Association. He has been involved in transportation matters for some 36 years and is familiar with shippers associations. In addition to Sunshine, he has been affiliated with two other shippers associations. Among other things, witness Carolan testified that problems involved in the transportation of small shipments caused his company to avail itself of the benefits derived from membership in shippers associations, and that its problems were solved when his company began using the services of shippers associations. With respect to his involvement in New Jersey Shippers Association, witness Carolan indicated that that association has been moving traffic to Florida since 1950, used various distributions during that period and had some difficulties with the arrangement. The method of handling was that New Jersey Shippers Pooling Association would piggyback trailers to Jacksonville, where they would be handled by local cartage agents, co-loaded with shipments of other shippers associations and moved to other points in Florida, using the services of various cartage agents. In 1967, his company began using Florida All State Consolidators, which later became FASCO. In 1970, according to Carolan, Mr. Wright of Helme Products, suggested to him the formation of a shippers association in Jacksonville for the purpose of facilitating the movement of traffic to various destinations in the state of Florida. It was for these reasons, according to Carolan, that he assisted Wright in the formation of Sunshine and advocated the subsequent membership therein of New Jersey Shippers Pooling Association. Carolan indicated

that if membership of one association in another association is determined to be illegal, he would recommend that each member of New Jersey Shippers Pooling Association become a member of Sunshine. Further, witness Carolan testified that it was the board of directors who controlled and determined the policy of Sunshine, and that as a member of Sunshine's board, he attempted to see that this was actually done. Carolan stated that one of the local cartage companies previously used by his company was Rapid Cartage, which was subject to a cease and desist order by the Interstate Commerce Commission. He indicated, however, that New Jersey Shippers Pooling Association stopped using Rapid Cartage because of poor service prior to the entry of the cease and desist order. It was Carolan's opinion that it was not only proper, but very necessary to have local Jacksonville businessmen as members and directors of the association.

Robert Wright, President of Sunshine and a member of its board of directors, an employee of Helme Products and its division Whitehall Products, stated that his company is a member of Sunshine as well as a member of New Jersey Shippers Pooling Association. With regard to his role in the formation of Sunshine, witness Wright testified generally as to his company's difficulty in moving its product to Florida. He testified that in the past, his company used the Seaboard Coastline Railroad for its shipments out of Jacksonville to other points in Florida. Out of Jacksonville, these shipments were less-than-carload shipments. Also, his company resorted to various motor carrier services out of Jacksonville. He testified that in the latter part of 1960 and early 1970, his company began experiencing extreme difficulties with services in Florida and that to resolve these diffculties, his first action was to join the New Jersey Shippers Pooling Association. As to the formation of Sunshine, witness Wright testified that he contacted Carolan and discussed the feasi-

bility of a shippers association in the Jacksonville area. After this, he decided to form an association in Jacksonville. Through business contacts in Florida, Wright contacted deMontmollin and offered him a position as Executive Secretary with the association. This offer was conditioned upon the association's formation and upon local participation by Jacksonville businessmen, as he felt that local participation was important if the association were to succeed in Jacksonville. According to the original plan, the association would handle both northbound and southbound traffic, and with that in mind, he contacted Mr. Bailey, who, as indicated, was a former railroad employee, and now a Jacksonville businessman.

As to the actual formation of Sunshine, Wright asked deMontmollin to contact Beakes in order to begin preparation leading to the formation and incorporation of Sunshine. Witness Wright reaffirmed the testimony of Beakes to the effect that O'Leary represented Baltimore Shippers and Receivers Association at the first meeting and that deMontmollin did not attend the initial membership meeting on May 6, 1971. At the first membership meeting, it was decided that to have a balanced slate of officers, it would be necessary to have them from Jacksonville, as well as elsewhere, and that particularly the Treasurer, Secretary and Executive Secretary should be local residents.

Witness Wright further testified that while no lease has ever been executed for the office space occupied by Sunshine, the board had specifically authorized deMontmollin to sign a lease if the landlord so desired. At the first meeting, Wright stated, the board selected an auditor, authorized the establishment of a bank account, discussed the actual physical operations of Sunshine, determined that there was insufficient traffic to justify northbound movements out of Jacksonville, and selected Tampa

and Miami as the Florida points for the movement of traffic out of Jacksonville.

As to the selection of cartage companies, the board instructed deMontmollin to find out and use at Tampa and Miami the same cartage company that the railroad uses, and that if the railroad did not have a local cartage company, deMontmollin was to ascertain the cartage companies operating in those areas and submit the names thereof to Mr. Wright for selection. According to witness Wright, at the first meeting, the board formulated membership charges and discussed supervision and control by the board of the duties and responsibilities of deMontmollin. He stated that the formulation of charges for members was based on out-of-pocket-costs plus line-haul piggyback costs, a formula designed to achieve a zero balance for Sunshine. As to the delay in receiving the initial financial report, this was attributed to the auditor's insistence that Sunshine's fiscal year coincide with his schedule. Because of this, the auditor was replaced and thereafter financial reports have been promptly prepared and submitted. All of the actions described above, according to Wright, were taken by the board or by officers representing the board.

Witness Wright testified that after the first meeting on May 6, 1971, there was no other meeting of Sunshine until December 7, 1971, the reason being that Sunshine was just getting underway, tonnage was very slow, and "there was no reason to hold the meeting." In the interim between meetings, Wright stated that he personally exercised supervision over deMontmollin via weekly telephone conversations and by a personal visit to Jacksonville in September, 1971. He further stated that in the December, 1971 meeting, the board entered into a contract with FASCO; that this contract is still in existence but is terminable on 30 days' notice; that at a general membership meeting held on February 8, 1972, two representa-

tives of FASCO attended the meeting at the invitation of Sunshine's President for the purpose of discussing problems relating to loading or unloading members' freight.

With respect to Sunshine's non-profit status, witness Wright indicated that as of December 31, 1973, the first year in which Sunshine had surplus earnings, its balance sheet showed retained earnings of $7,753. According to witness Wright, the board decided not to distribute any of the surplus among its members because all of it would be necessary to pay legal fees incident to this proceeding.

He further stated that as of January 31, 1974, there were 27 members of Sunshine, all of whom had been approved by a majority vote of the board and notified by letter of their acceptance as members of Sunshine.

As to DeKroyft's status as an honorary director, Wright testified that both the board and DeKroyft had always been aware of DeKroyft's status as an honorary non-voting director and that DeKroyft has never taken any position with respect to matters relating to FASCO and Sunshine. As to deMontmollin's selection of a drayman in Tampa, Wright testified that this action was done pursuant to his (Wright's) instructions and approval.

Regarding the inclusion of a motor carrier conference tariff in Sunshine's rate schedule, Wright testified that such rates are applicable to less-than-truck-load shipments, and that any such movement was subject to the member's instruction as to which carrier was to be used. On such movements, the carrier bills the member directly and the particular tariff that was included in Sunshine's rate schedule was for information purposes only. Wright testified that his company, Helme Products, has received substantial benefits from its use of Sunshine, stating that its transportation and distribution savings have amounted to $25,000 a year. On cross-examination, Wright restated his position that deMontmollin's ac-

tivities and duties are under the continuous control of the board of directors, and that when deMontmollin attended membership meetings, his attendance was always at the invitation of members. Wright maintained that his conduct and that of the board were at all times proper in all respects.

DISCUSSION AND CONCLUSIONS

The general issue in this proceeding is whether Sunshine is operating as a bona fide shippers association or whether it is conducting a freight forwarder operation in violation of the licensing requirements of Part IV of the Interstate Commerce Act and whether deMontmollin and FASCO have been and are participating in such violations. The determination of this issue is controlling because a shippers association is not subject to the regulations applicable to freight forwarders. In determining this issue, numerous subsidary or specific issues must necessarily be resolved. The pertinent statutory provisions are set forth below.

Section 402(a)(5) of the Act defines "freight forwarder" as follows:

> The term "freight forwarder" means any person which (otherwise than as a carrier subject to Part I, II, or III of this Act) holds itself out to the general public as a common carrier to transport or provide transportation of property, or any class or classes of property, for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the

transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to Part I, II, or III of this Act.

Section 402(c) provides that:

> The provisions of this part shall not be construed to apply (1) to the operations of a shipper, or a group or association of shippers, in consolidating or distributing freight for themselves or for the members thereof, on a non-profit basis, for the purpose of securing the benefits of carload, truckload, or other volume rates, or (2) to the operations of a warehouseman or other shippers' agent, in consolidating or distributing pool cars, whose services and responsibilities to shippers in connection with such operations are confined to the terminal area in which such operations are performed.

The licensing provision of Part IV of the Act, section 410(a)(1) provides, in part, that:

> No person shall engage in service subject to this part unless such person holds a permit, issued by the Commission . . . .

In discussing the purposes and objectives of freight forwarders and shippers associations, the Commission stated in *National Motor Freight* v. *New Hampshire Shippers Co-Op*, 323 I.C.C. 658, 663, 664, that since "the operations and existence of regulated freight forwarders and of bona fide shippers' associations is predicated on the expedition and economy available . . . . through the tendering of volume shipments to underlying carriers rather than numerous smaller ones, it is readily apparent that the physical operations of both will parallel and be similar to each other in many respects, albeit the former takes a portion of such savings as may be realized as its profit and the latter does not."

In that case, the Commission recognized the physical similarity in the operations of a freight forwarder and a shippers association, and concluded that such similarity in operations is not determinative of the true status of a shippers association, 323 I.C.C. at 664, noting that in *Atlanta Shippers Assn., Inc.—Investigation*, 322 I.C.C. 273, the entire Commission pointed out that "the shipper obtains from the non-profit group or association of which it is a member the same physical transportation service as that which it would receive from any recognized forwarder" and that "the functional distinction between regulated and nonregulated consolidating and distributing operations are not to be found in these physical characteristics which are thus identical for all practical purposes."

The similar activities in which both freight forwarders and shippers associations engage are the consolidation of shipments or pool-car operations and the break-bulk distribution of freight. Freight forwarders hold themselves out to the general public to provide a complete transportation service, issuing to the shipper a through bill of lading, charging a through rate, assuming complete common carrier responsibility for the safe carriage and delivery of the goods and using the services of other carriers for the physical movement of the freight. The three parts of a freight-forwarder service are (1) assembling (gathering shipments from numerous individual shippers), (2) consolidating the shipments into truckload or carload lots and moving them to a break-bulk station,[10] and (3) breaking up and distributing shipments

[10] A break-bulk station is a point at which a portion or all of the contents of a car are unloaded and distributed. See *Definitions of Terms, Units and Phrases*, published by the Finance, Accounting, Taxation and Valuation Department, Association of American Railroads (1953).

to individual receivers. See *Freight Consolidators Cooperative, Inc.* v. *United States*, 230 F. Supp. 692, 696.

In contrast to freight forwarders, shippers associations perform services only for their dues-paying members and do not hold themselves out to serve the general public. They do not assume common carrier responsibility for the shipment from point of assembly to point of destination, and since a bona fide shippers association is a non-profit cooperative organization, its members bear the burdens of its operations, including the expenses of the consolidation and distribution operation. Also, members share in any surplus monies remaining in the association at the end of the year. In order that the operations of a shippers association come within the statutory exclusion of section 402(c), it must be shown that the association acts at all times as agent for its shipper-members, who as its principals, (1) possess the exclusive right and ability to control the operations, and (2) assume, both jointly and severally, the essential risks entailed in conducting such operations. See *Freight Consolidators Cooperative, Inc.* v. *United States*, *supra* at 696.

While many of the facts of record are conceded by respondents, certain other basic facts or inferences to be drawn therefrom are in dispute. However, the essential facts relating to the membership of other shippers associations in Sunshine are not in dispute. On April 24, 1972, five shippers associations claimed membership in Sunshine, and as of January 31, 1974, out of a total of 27 members, eight shippers associations are listed as members. Thus, the first question to be resolved in determining whether Sunshine is a bona fide shippers association is whether one shippers association may properly become a member of another shippers association within the meaning of section 402(c).

The Bureau contends that a shippers association, such as New Jersey Shippers Pooling Association, does not qualify as a bona fide member of another shippers association (Sunshine). In support thereof, the Bureau argues that such a shippers association is not in and of itself a shipper and therefore cannot meet "the qualifications of a shipper" as that term is used in section 402(c)(1). Further, the Bureau contends that while co-loading has been approved, *National Motor Freight Traffic Assn., Inc.* v. *Columbia Shippers Assn.*, 105 M.C.C. 846, the matter here is far different from co-loading. The Bureau further contends that had Congress intended that a shippers association could properly become a member of another shippers association, it would have specifically so stated. In this connection, the Bureau points out that in the case of agricultural cooperatives, specific language in section 203(b)(5) permits one agricultural cooperative to join another.

The intervenors in support of the Bureau contend that a shippers association does not qualify as a member under Sunshine's original by-laws which limit membership to "retailers, jobbers, wholesalers or manufacturers," and that the recent amendment in the by-laws was merely an attempt retroactively to open the membership roster to shipper associations who were not legitimate members.

On brief, the respondents argue that the legislative history of section 402(c) fails to reveal that Congress intended any limitation to be placed upon the shippers association exclusion, that the Act does not prohibit a shippers association from becoming a member of another shippers association, that the intent of one association joining another is the same as the co-loading intent and that the rationale of the decisions authorizing the practice of co-loading is applicable here. Moreover, respondents argue, the Commission has defined the term

"shipper" to include a shippers association (49 C.F.R. 1320.10), that this definition should be a rule of general application and that therefore it is permissible under section 402(c)(1) to have an association of associations. In furtherance of this view, respondents argue that the present situation is on all fours with the Commission's ruling that an agricultural cooperative association may properly become a member of another such association and the operation continues to remain exempt under section 203(b)(5) of the Act. Also, respondents argue that as early as 1930, it was firmly established in federal law that one association may join another, citing 36 *Op. Att'y Gen.* 326.

The arguments of respondents are not totally without merit. For example, in *Atlanta Shippers Assn., Inc.—Investigation*, 322 I.C.C. 273, the Commission held that the mere incorporation of a shippers association does not in and of itself bring a shippers association within the licensing provisions of the Act, stating that in the absence of a clear legislative mandate to the contrary, the simple phrase "group or association of shippers," as used in section 402(c), "must be accorded an uncomplicated non-technical meaning under which corporations would not be excluded from its ambit." 322 I.C.C. 287. In effect, the Commission held that a corporation is entitled to the protective safeguard of section 402(c), even though the term "coporation" is not specifically mentioned therein. The Commission noted, however, that prior to the passage of the Freight Forwarder Act, there were in existence incorporated and unincorporated shippers associations, and the silence of Congress on the matter indicated that the difference in the two forms of enterprise was not significant. 322 I.C.C. at 287, footnote 7. Unlike the situation in the *Atlanta decision, supra*, where the corporate form had been used prior to the passage of the Freight Forwarder Act, there is no history of

joinder of two or more shippers associations prior to its enactment.

Thus, the undersigned does not believe that the *Atlanta decision* or any other decided case requires a liberal interpretation of section 402(c). See *Freight Consolidators Cooperative, Inc.* v. *United States*, 230 F. Supp. 692, 699.

Nor does the legislative history support the arguments advocated by the respondents. While the legislative history indicates that "groups of shippers, and non-profit associations of shippers" were to be excluded from the definition of a freight forwarder, it appears that the use of the plural (associations) was merely descriptive of those intended to be excluded and had nothing whatsoever to do with whether one shippers association could properly join another. H. R. Rep. No. 1172, 77th Cong., 1st Sess., p. 6.

Moreover, the fact that an agricultural cooperative association may join another does not support the respondents' argument that one shippers association may properly join another, for in the case of agricultural associations, a federation of associations is specifically authorized by statute. Nor does it appear that the membership in Sunshine of several shippers associations is merely an extension of the co-loading practice. Also, the fact that the term "shipper" in credit regulations (49 C.F.R. 1320.10) has been defined to include shippers associations, does not necessarily mean that a shippers association is a shipper within the meaning of section 402(c), especially, where as here, the shippers associations are not, in fact, shippers. The associations here under consideration have no ownership in the merchandise being shipped, but act solely on behalf of their own members and thus they are not shippers and do not fall within the exclusion of section 402(c). The

fact that shippers associations may be shippers for other purposes is not controlling.

Since there is nothing in the legislative history of the Freight Forwarder Act or in the decided cases requiring a liberal construction of section 402(c), it appears that the legislative intent is to be ascertained from the language used in the statute. It is to be noted that the Interstate Commerce Act, including the Freight Forwarder part, is remedial in nature and that exceptions to the Act's regulatory plan are to be strictly construed. *Freight Consolidators, Inc.* v. *United States, supra* at 699. Applying that rule of construction, there is no language in section 402(c) which specifically authorizes the joinder of one shippers association with another. As indicated, a shippers association having no beneficial ownership in the goods shipped cannot reasonably be held to be a shipper. The fact that the statute does not preclude multiple association membership is not controlling. Had Congress intended such an arrangement, it would have specifically so provided, and it did not do so in section 402(c). If shippers associations who are, in turn, composed of several members, are permitted to join another shippers association, a situation would soon arise under which the parent association would be serving the general public—a result obviously contrary to the spirit and intent of section 402(c).

In view of the above, it is concluded that New Jersey Shippers Pooling Association, Inc., and other shippers associations that claim membership in Sunshine are not bona fide shippers and that therefore they do not meet the eligibility requirements for membership in Sunshine. Since approximately one-third of Sunshine's members are other shippers associations, it must be held that Sunshine, as now constituted, is not a true shippers association within the meaning of section 402(c). However, since the organizers, directors and officers of Sunshine believe

that the membership of other shippers associations in Sunshine is proper, and since the matter has never been decided by the Commission or by the courts, it is the opinion of the undersigned that Sunshine should be afforded an opportunity to rectify the situation by terminating in Sunshine the membership of other shippers associations. Sunshine will be afforded a reasonable opportunity to accomplish this. There are other claimed members, mostly Jacksonville businessmen, who admittedly do not use the services of Sunshine, and hence are not shippers. Their membership should be terminated unless there is a reasonable likelihood that they will use Sunshine in the reasonably foreseeable future. The order will be so conditioned.

Another related issue is whether non-members of Sunshine are eligible to avail themselves of Sunshine's services. This latter issue arises out of the fact that shippers who are not members of Sunshine, but who are members of the New Jersey Shippers Pooling Association and other shippers associations, use the facilities of Sunshine. In effect, respondents claim that these shippers have vicarious membership status in Sunshine as a result of their membership in other shippers associations who are members of Sunshine. As stated, other shippers associations have no membership status in Sunshine and therefore their members have no membership status in Sunshine. As between Sunshine and such shippers, there is absolutely no privity. In a true shippers association, it must be shown that the shipper association acts as agent and the shipper-members are the principals. Obviously, such a relationship between members of other associations and Sunshine does not exist. Absent such relationship, such shippers lack the exclusive right and ability to control the operations of Sunshine and do not assume the essential risks entailed in conducting Sunshine's operations—two basic requirements for the establishment of a true shippers associa-

tion. See *Freight Consolidators Cooperative, Inc.* v. *United States, supra* at 696. It is accordingly concluded that there must be a direct principal-agency relationship between the shipper and Sunshine and this can only be accomplished by a shipper becoming a dues-paying member of Sunshine. See *Freight Consolidators Cooperative, Inc.* v. *United States, supra* at 696. In the future, shippers using Sunshine's services must become members of Sunshine and acquire the right to control Sunshine's operations and assume the risks incident thereto.

Since Sunshine took the position that other shippers associations qualify as members of Sunshine, and that members of such other associations may properly use the services of Sunshine and since its position in this regard is apparently sincere, it is the opinion of the undersigned that Sunshine should be afforded an opportunity to revise its membership roster by requiring that all shippers using its facilities, including shippers who are members of other shippers associations, who, in turn, are claimed members of Sunshine, make application for membership in Sunshine and become actual members thereof as a pre-requisite to using the facilities of Sunshine in the future. The good faith membership of such shippers should be demonstrated by the payment of appropriate membership dues by such shippers, and the approval of their membership by Sunshine's board of directors. The order herein will so provide.

An additional question has been raised as to whether non-members and non-shippers can serve as officers and directors of Sunshine. The Bureau and freight forwarder interests contend that the directors and officers have always been hand-picked, consisting mostly of shipper association representatives, rather than bona fide shippers and the composition of the officers and directors is a further indication that the domination and control of Sunshine is not actually vested in members. The

record shows that several officers and directors are not shipper-members of Sunshine.

The Commission has approved the corporate entity as an appropriate business form for conducting the affairs of a shippers association, *Atlanta Shippers Assn., Inc.—Investigation, supra*, and this includes the right to conduct the business through directors and officers. While, theoretically, the directors are answerable to the members, and may be removed or replaced by the members, it does not appear that members can retain the exclusive right and authority to control the operations of the association by transferring their right to non-member directors. Nor does it appear that they are in a position to assume the essential risks entailed in conducting such operations. By selecting directors who are not members, it appears that the members are abdicating their rights to control the operations of Sunshine and their responsibility, individually and collectively, to assume the risks incident to its operations. Members cannot enjoy the benefits of the operations without sharing its burdens. *Freight Consolidators Cooperative, Inc.* v. *United States, supra* at 697. The undersigned, therefore, is of the opinion that directors of Sunshine should be composed of bona fide shipper-members and that when a bona fide membership roster is established, appropriate steps should be taken by the members to elect a new board of directors. Sunshine will be afforded a reasonable period of time to conform with this requirement and the order herein will so provide. Under this ruling, the activities of Sunshine will always be under the control of its members, or at least shipper-members will possess the power to control.

The situation respecting officers is somewhat different. Since officers are merely carrying out the policy and management decisions of the member-directors, they need not be members themselves. Certainly, no good reason

appears why the Secretary, Treasurer or Executive Secretary need be a member. The Executive Secretary is responsible for the day-to-day operations of the corporation and is not involved in management decisions. The Secretary and Treasurer merely perform ministerial functions, and the other officers execute the policy decisions of the board of directors. Membership in Sunshine should not be required for such functions, as the status of officers does not appear to shift or alter the rights and responsibilities of the members. The order to be entered herein will not require any change in the eligibility or qualifications of officers. However, upon the election of new directors, such directors should either re-appoint or replace, in whole or in part, the present slate of officers.

There is conflicting testimony of record as to who actually organized and set up Sunshine's operations. The Bureau and the freight forwarder interests contend that it was deMontmollin who organized it, citing evidence that he acknowledged to the Commission's investigator his role in the formation of Sunshine. They point to the fact that deMontmollin had a long history of employment with the freight forwarder industry and from this, they contend, the inference should be drawn that deMontmollin is an entrepreneur who set up the association as a freight forwarder, calling it a shippers association to avoid regulation. As Executive Secretary, he is said to publish rates, make arrangements for transportation, and in addition to the supervision of Sunshine's day-to-day operations, sets policy and is in complete control of Sunshine, free of any instructions or directions from the board of directors.

No adverse inference can be drawn from the fact of deMontmollin's prior connections with the freight forwarder industry. Moreover, as previously set forth in detail, the rebuttal testimony of Messrs. Beakes, Carolan and Wright, as well as deMontmollin's testimony, refutes the claim that deMontmollin did, in fact, organize Sunshine. Their evidence shows that the moving force behind the formation of Sunshine came from Carolan and Wright, who were dissatisfied with transportation service in Florida. They conceived the idea of forming Sunshine and early in 1971, Carolan, Wright and Robert DeKroyft of the New Jersey Shippers Pooling Association, met with deMontmollin and asked him to work for the new association to be formed. After the decision was made to form Sunshine, Mr. Beakes, an attorney-at-law of Jacksonville, who became Secretary of Sunshine, undertook the creation of Sunshine, including the preparation of the certificate of incorporation and the pre-incorporation agreement. At most, deMontmollin performed some routine functions incident to the formation of Sunshine, but always at the behest of either Mr. Wright, or Mr. Beakes, or both. Although deMontmollin received applications of prospective members, he did not approve them and he did not solicit prospective members. Membership in Sunshine is approved by the board. Also, deMontmollin played no part in negotiating the contract between Sunshine and FASCO and his duties in connection with local cartage agents beyond Jacksonville were defined and directed by the board of directors and by Sunshine's president. The conclusion is therefore warranted that deMontmollin did not organize Sunshine, but that the formation of Sunshine was motivated, directed and supervised primarily by Wright and Carolan, aided by DeKroyft and Beakes, and that in light of events leading up to the formation of Sunshine, there is no basis for the charge that deMontmollin was an entrepreneur who organized Sunshine for his own personal gain. Moreover, there appears to be nothing unusual or irregular in the fact that several Jacksonville businessmen made loans to Sunshine to defray start-up costs. At least some of these were potential shippers; they

thought they could benefit from Sunshine's services and that transportation service in Jacksonville could be improved.

As to deMontmollin's present duties as Executive Secretary, the record fails to show that he does anything more than supervise the day-to-day activities of Sunshine with respect to the movement of traffic. Among other things, he provides tracing and rating, maintains accounts payable and receivable, bills members for charges, and assists members in processing claims. Except for routine matters, the board directs and approves Sunshine's major policy. The undersigned can attach no significance to deMontmollin's role in circulating rate schedules. Neither he nor Sunshine published rates, but rather schedules of rates of a motor carrier conference were circulated by deMontmollin to members for information purposes. The Bureau and intervenors emphasize the fact that deMontmollin was under contract with Sunshine, and that he was designated therein as a contractor, raising the inference that deMontmollin is an independent contractor and as such, controls the operations of Sunshine. It is to be noted also that the contract refers to deMontmollin's role in Sunshine as "Executive Secretary" and sets forth his duties in this capacity with particularity. The contract expired in May, 1972, and has not been renewed. Since then, deMontmollin has been serving Sunshine at the pleasure of the board. Neither the contract itself nor the activities of deMontmollin with Sunshine support the conclusion that deMontmollin is anything more than an Executive Secretary, and no adverse inference is to be drawn from the designation "contractor" in his contract. Accordingly, it is the opinion of the undersigned, and he so finds, that deMontmollin coordinates, but does not control the activities of Sunshine.

The record shows that deMontmollin pays the salaries of part-time employees out of his own pocket or from

funds of a corporation owned by him and his wife. It is believed that this expense should be absorbed by Sunshine members rather than by deMontmollin, for one of the requisites of a true shippers association is the assumption by members of all risks and burdens incident to its operations. While this is a minor expense and apparently is one that is sometimes borne personally by Executive Directors, the undersigned is of the opinion that the salaries of part-time employees of Sunshine should be paid by Sunshine, and that such salaries should then be assessed as a charge against Sunshine's members. The order herein shall so provide.

Also, the undersigned believes that Sunshine's insurance reserve program under which it pays loss and damage claims of members up to $250.00, should be terminated. The matter of settling loss and damage claims relating to transportation is one between the underlying carriers and shippers. Sunshine, therefore, should not assume the responsibility of paying such claims, either as a self-insurer or under any other insurance program. Any such insurance program merely adds support to the argument that Sunshine has common carrier status. The order to be entered herein will require that the practice by Sunshine of paying loss and damage claims to its members be terminated. This requirement is not intended to preclude Sunshine from assisting shipper-members in the preparation and processing shipper-member claims.

It is to be observed that Sunshine was created as a non-profit organization. In 1973, it had a small net income or surplus. Although surplus money is supposed to be distributed to members, it was not so distributed in 1973 because it was felt that the amount would be necessary to cover the cost of legal expenses incident to this proceeding. Under the circumstances, the undersigned is of the opinion that such action is justified.

Even non-profit organizations may show a surplus, and so long as the members share in the excess, the fact of a surplus does not affect its status as a non-profit corporation. In the future any surplus should be returned to members on a pro rata basis.

Turning next to DeKroyft, the record shows that he is part-owner of FASCO, Executive Secretary and Attorney for New Jersey Shippers and for a time, was a director of Sunshine. Since the latter part of 1972, he has been carried on Sunshine's roster as a non-voting honorary director, even though Sunshine's by-laws do not specifically provide for that title. The question has been raised as to (1) his interest and control over Sunshine's operations, and (2) the propriety of his status of an honorary director. It has been shown that DeKroyft exercises any control over Sunshine nor can such control be implied from his business interest in FASCO. FASCO was in existence at least two years before Sunshine was created and Sunshine's contract with FASCO was arranged and approved by Mr. Wright, Sunshine's president, because of FASCO's efficient services. As to DeKroyft's status as an honorary director of Sunshine, the undersigned believes that his status should be terminated because the title is not specifically provided for in Sunshine's by-laws. While this is a minor matter, it nevertheless appears that DeKroyft should resign his directorship or that Sunshine's by-laws be amended to sepcifically provide for the title of honorary director. As an alternative, there appears to be no objection to DeKroyft serving Sunshine in the capacity of a consultant.

As indicated, FASCO has a contract with Sunshine, effective as of May 1, 1971, under which FASCO provides certain services for Sunshine. FASCO is referred to in the contract as an independent contractor, and is paid on a per hundred weight basis and the trailer loads

handled. Prior to the incorporation of FASCO, another carrier—Rapid Freight Consolidators, Inc. (Rapid Frieght), performed assembly and consolidation services at Jacksonville on behalf of New Jersey Shippers Pooling Association, and the activities of Rapid Freight were subject to a cease and desist order of the Commission, Division I, dated February 24, 1969. The order was a result of an offer of settlement submitted by Rapid Cartage and approved by the Commission. At the time of this order, the principal users of Rapid Cartage were dissatisfied with its services, notably poor claim service, lack of information and other such failures. Upon ceasing the use of Rapid Cartage, New Jersey Shippers Pooling Association began using the services of Fascon, predecessor of FASCO. Respondents concede that the services performed by FASCO are essentially the same as those previously performed by Rapid Cartage which was subject to the cease and desist order. As a result of these circumstances, the Bureau and intervenors contend that FASCO's services are illegal. The facts do not necessarily support that conclusion. The cease and desist order was not based on findings of illegal operations by Rapid Freight, but was predicated upon an offer of settlement submitted by Rapid Cartage. From these circumstances, it does not necessarily follow that the activities of FASCO are illegal.

It appears that the determination of the legality of FASCO's operations rests upon its participation in Sunshine's operations and its specific relationship to Sunshine. As in the case of deMontmollin, FASCO is not an agent invested with the power to control Sunshine. The record reflects that the organizers of Sunshine selected FASCO and not vice versa. Moreover, the contractual agreement between Sunshine and FASCO specifically provides that either party has the right to enter into other contracts for or to provide pick-up and delivery service

within the Jacksonville terminal area. Thus, it appears that deMontmollin's and FASCO's activities are proper, except to the extent that they are affected by Sunshine's status. Since Sunshine's activities are not those of a bona fide shippers association, both deMontmollin's and FASCO's operations are tainted by reason of their participation therein. However, when Sunshine complies with the requirements of this report and the order herein, it is believed that deMontmollin's and FASCO's operations will similarly become unobjectionable.

Summarized, it is the opinion of the undersigned that the activities of Sunshine more nearly conform with the concept of a shippers association rather than with the definition of a freight forwarder. Here there is no evidence of holding out to the general public to provide a transportation service since its service is limited to its members and to members of other shippers associations, who, in turn, claimed membership in Sunshine. Although the concept of multiple association membership, as indicated, must be changed, the record does not warrant a finding that Sunshine performs a transportation service for the general public or that it holds itself out to perform such service. Moreover, it does not appear that Sunshine is performing its service for "compensation" because its charges are predicated, so far as possible, upon the actual costs of the underlying carriers, a nominal charge for its own services, and a one-time membership fee. Sunshine's by-laws provide that all charges to members shall be equal to "all costs of operations so as to come out to zero," and Sunshine has adhered to this principal, except in 1973 when it had a small surplus which it retained to assist in defraying the legal cost of this proceeding. Lacking the elements of compensation and a holding out to the public, Sunshine's services do not fall within the definitions of a freight forwarder. Nor does the fact that the physical aspects of Sunshine's

service correspond to that regularly provided by a freight forwarder bring it within the definition of a freight forwarder. See *Barre Granite Assn., Inc.—Freight Forwarder Application*, 265 I.C.C. 637, 639. It is accordingly the opinion of the undersigned that the Bureau failed to sustain its burden of proof with respect to the claim that Sunshine is and has been operating as a freight forwarder.

The fact that Sunshine is not a freight forwarder does not automatically make it a shippers association. From the beginning, Sunshine was conceived and organized as a shippers association, and its certificate of incorporation and its by-laws clearly show that it was intended to be a shippers association. However, no matter what Sunshine chooses to call itself, it is not a shippers association unless it conforms with the language and intent of the provisions of section 402(c)(1). As discussed above, the undersigned is of the opinion that there are basic defects in the organization of Sunshine that preclude a finding that Sunshine is a true shippers association. For reasons preivously stated, however, the undersigned believes that as an alternative to a cease and desist order against Sunshine and the other respondents, Sunshine should be given a reasonable opportunity to change its organizational structure and activities in a manner that will demonstrate that it is a bona fide shippers association within the meaning of section 402(c)(1) of the Act.[11]

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[11] In view of this decision, the issue as to where the burden of proof lies is not of great significance. It would seem, however, that the overall burden of proving illegal activities by respondents is on the Bureau, while the specific burden of showing that respondents' activities are within the clarifying provisions of section 402(c) is upon respondents. Cf *National Motor Freight Traffic Assn. v. United States*, 242 F. Supp. 601, 605. Moreover, since Sunshine has invoked the provisions of section 402(c), it has therefore subjected itself to the Commission's jurisdiction and thus there is no merit in the claim that the Commission has no jurisdiction over Sunshine or its operations.

Without going into detail, the undersigned is of the opinion that there is no basis for recommending that the freight forwarder interests be investigated or admonished and censored. There is insufficient evidence pointing to violations by the freight forwarders and the clean hands doctrine does not appear applicable to this type of proceeding. Therefore, the request of respondents is denied.

Arguments and contentions not specifically discussed herein have been considered and found to be without merit.

ULTIMATE FINDINGS AND ORDER

Upon consideration of the record herein, the Administrative Law Judge finds: (1) that the Commission has jurisdiction over the respondents and over the subject matter herein; (2) that the activities of Sunshine State Shippers and Receivers Association, Inc. do not come within the definition of a freight forwarder as defined in section 402(a)(5) of the Act; (3) that Sunshine State Shippers and Receivers Association, Inc., is not a bona fide shippers association within the meaning of section 402(c)(1) of the Act; that other shippers associations do not qualify as bona fide members of Sunshine and that therefore their memberships in Sunshine should be terminated; (5) that other purported members of Sunshine who neither use Sunshine's services nor reasonably expect to use said services in the future do not qualify as bona fide members of Sunshine and that therefore their memberships in Sunshine should be terminated; (6) that shippers who are members of other shippers associations and who use the services of Sunshine by reason of their membership in such other associations must become dues-paying members of Sunshine as a prerequisite to further use of Sunshine's services; (7) that persons other than bona fide shipper-members in Sunshine, or representatives of bona fide shipper-members,

do not qualify as directors of Sunshine and that therefore their directorships should be terminated; (8) that payment by Sunshine of loss and damage claims incident to transportation movements is improper and that therefore such payments and the maintenance of any insurance program for such payments should be terminated; (9) that expenses representing compensation to part-time employees of Sunshine should be assumed by the members of Sunshine, and not personally by the Executive Secretary of Sunshine; (10) that the appointment of Robert DeKroyft as an honorary director of Sunshine is contrary to Sunshine's by-laws and should be terminated; (11) that Sunshine should be given a reasonable opportunity to make these changes in its organizational structure and such other changes as may be necessary to bring it within the provisions of section 402(c)(1); (12) that Sunshine should be given 60 days from date of service of this order in which to make the necessary changes referred to herein and that in the interim during which Sunshine is restructing its organization, only bona fide dues-paying members of Sunshine may use its services; and (13) that at the expiration of the 60 day period, Sunshine shall report to the Commission, in accordance with Rule 99 of the Commission's Rules of Practice, the steps taken by it to bring it within section 402(c)(1) of the Act.

The Administrative Law Judge further finds that this decision is not a major federal action affecting the quality of human environment within the meaning of the National Environmental Policy Act of 1969.

It is therefore the order of the Administrative Law Judge that Sunshine State Shippers and Receivers Association, Inc., Harry deMontmollin and Florida All State Consolidators, Inc., and the officers and directors of the said Sunshine State Shippers and Receivers Association, Inc., be, and they are hereby, directed immediately

upon service of this order, to make the necessary changes referred to in the findings hereof and at the expiration of 60 days from date of service of this order, Sunshine State Shippers and Receivers Association, Inc., be, and it is hereby, directed to notify the Commission whether compliance with this order has been made and the details thereof.

Dated at Washington, D.C., this 29th day of August, 1974.

By the Commission, William J. Gibbons, Administrative Law Judge.

/s/ William J. Gibbons,

ROBERT L. OSWALD,
Secretary.

[SEAL]

30793

[Served August 1, 1975]

INTERSTATE COMMERCE COMMISSION

No. FF-C-50

SUNSHINE STATE SHIPPERS AND RECEIVERS ASSOCIATION, INC. ET AL.—INVESTIGATION OF OPERATIONS

Decided July 11, 1975

Upon investigation, respondents found to have engaged and participated in the transportation of property, in interstate commerce, for compensation without appropriate authority. Cease and desist order entered.

O. C. Beakes, Ronald N. Cobert, Robert DeKroyft, and *Joe G. Fender* for respondents and interveners in support of respondents.

Edward W. Arnn, John J. Charuhas, and *J. Preston Proffitt, Jr.,* for the Bureau of Enforcement, Interstate Commerce Commission.

S. S. Eisen, L. Agnew Myers, Jr., and *Richard J. Riddick* for interveners in support of the Bureau.

REPORT OF THE COMMISSION

DIVISION 1, COMMISSIONERS MURPHY, GRESHAM, AND MACFARLAND

MACFARLAND, *Commissioner:*

Part IV of the Interstate Commerce Act [49 U.S.C. 1001, *et seq.*] provides for the regulation of freight for-

warders. This investigation proceeding involves consideration of the proper composition and functions of associations of shippers which, pursuant to the clarifying provisions of section 402(c) of the act,[1] are excluded from such regulation. This proceeding also represents the first occasion this Commission has had to determine whether the term "a group or association of shippers," as used in section 402(c), includes other shipper's associations.

The Administrative Law Judge who heard this matter concluded that respondent Sunshine State Shippers and Receivers Association, Inc. (Sunshine), of Jacksonville, Fla., is not a bona fide shippers' association. The fact that Sunshine had extended its membership to include other shippers' associations was one of the bases for that conclusion. The Administrative Law Judge expressed the opinion, however, that because the activities of Sunshine and the other respondents named below were based on their misunderstanding of a term not heretofore clarified in certain respects by this Commission, a sense of fairness requires that they be afforded a reasonable opportunity to bring their activities and operations into compliance with the provisions of section 402(c) before this Commission reaches a final decision. Separate and joint exceptions to these and other conclusions set forth in the Administrative Law Judge's initial decision, and

[1] Section 402(c) of the act reads as follows:

> The provisions of this part shall not be construed to apply (1) to the operations of a shipper, or a group or association of shippers, in consolidating or distributing freight for themselves or for the members thereof, on a nonprofit basis, for the purpose of securing the benefits of carload, truckload, or other volume rates, or (2) to the operations of a warehouseman or other shippers' agent, in consolidating or distributing pool cars, whose services and responsibilities to shippers in connection with such operations are confined to the terminal area in which such operations are performed.

replies thereto, were filed by various parties.[2] Our conclusions differ in several respects from those recommended.

Background

By order entered January 29, 1973, this Commission instituted an investigation on its own motion under the authority of section 403(f) of the act and section 2 of the Elkins Act [49 U.S.C. 42] into and concerning the operations of Sunshine with a view toward determining whether it has been and is engaging in the provision of or arranging for services as a freight forwarder in violation of section 410(a) of the act. The investigation was instituted to determine also whether deMontmollin, Sunshine's executive secretary, and FASCO, its drayage agent at Jacksonville, Fla., have been and are participating in said violations, and for the further purpose of issuing such orders and taking such other and further action as the facts and circumstances may appear to warrant. Oral hearings were held in Jacksonville in December 1973, and in Washington, D.C., in February 1974.

All facts pertinent to the disposition of this proceeding are set forth in the statement of facts of the Administrative Law Judge. The substance of that statement is re-

[2] Exceptions were filed (1) by the Bureau of Enforcement, Interstate Commerce Commission, to which Sunshine, Harry deMontmollin, and Florida All State Consolidators, Inc. (FASCO), (the latter two parties also being named respondents in the proceedings), New Jersey Shippers Pooling Association (New Jersey Shippers), and American Institute for Shippers' Association, Inc. (AISA), interveners in support of respondents, jointly replied; (2) by the National Conference of Non-Profit Shipping Association, Inc. (NCNPSA), intervener in behalf of respondents, which was given permission to intervene in this proceeding by the order entered herein on November 8, 1974; and (3) jointly by respondents and interveners (except AISA) in support of respondents, to which the Freight Forwarders Institute (FFI), individually and on behalf of its members participating in this proceeding, and Florida-Texas Freight, Inc., intervener in support of the Bureau, separately replied.

produced in the appendix to this report. Sunshine's organizational structure, respondents' individual and collective activities, and the operations that were conducted purportedly as a shippers' association are there described. We find the statement of facts embraced in the Administrative Law Judge's report to be correct in all material respects and, except as clarified herein, we adopt that statement as our own. For the most part, therefore, our discussion will be confined to the issues raised on exceptions.

INITIAL DECISION

The Administrative Law Judge found that this Commission properly invoked jurisdiction over respondents and the subject matter here involved; that Sunshine is not a bona fide shippers' association within the meaning of section 402(c)(1) of the act; that certain changes ought to be made in its organizational structures and activities; and that it should be given a reasonable opportunity to make such changes as will demonstrate it is a bona fide association. In addition, the Administrative Law Judge concluded that Sunshine's activities do not come within the definition of a freight forwarder as defined in section 402(a)(5) of the act;[3] that shippers'

[3] Section 402(a)(5) of the act sets forth in detail the definition of a freight forwarder:

> The term "freight forwarder" means any person which (otherwise than as a carrier subject to part I, II, or III of this Act) holds itself out to the general public as a common carrier to transport or provide transportation of property, * * * for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to part I, II, or III of this Act.

associations do not qualify as members of bona fide shippers' associations and, therefore, the memberships of such associations in Sunshine should be terminated; that purported members of Sunshine that neither use nor reasonably expect to use its services in the future do not qualify as bona fide members of Sunshine and, thus, such memberships should be terminated; that shippers who are members of other shippers' associations that use the services of Sunshine by reasons of such memberships must become dues-paying members of Sunshine as a prerequisite to such use in the future; that only bona fide shipper-members of Sunshine or representatives of bona fide shipper-members are eligible to serve on its board of directors; that payment by Sunshine of loss and damage claims incident to transportation it performs is improper and that making such payments and maintenance of an insurance program for that purpose should be terminated; that expenses representing compensation paid to certain part-time employees of Sunshine by deMontmollin should be assumed by Sunshine; that appointment of an honorary director to Sunshine's board of directors should be canceled as contrary to its bylaws; that Sunshine should be given a period of 60 days in which to make the changes described above in its organizational structure and activities in order to bring it within the provisions of section 402(c); that during the time such restructuring and modification takes place only Sunshine's bona fide, dues-paying members may use its services; and that at the expiration of the 60-day period Sunshine must report to the Commission, in accordance with Rule 99 of this Commission's General Rules of Practice (49 CFR 1100.99), the steps it has taken to bring its operations and activities within the statutory exclusion.

EXCEPTIONS

Generally, the arguments put forth in the exceptions relate to each of the Administrative Law Judge's recom-

mendations Central to several arguments on both sides, however, are two points of view over which the parties seem to be most in conflict. They are: (1) that the Bureau and those who support its position believe the Administrative Law Judge erred in concluding that Sunshine is neither a bona fide shippers' association nor a freight forwarder, but it should be given an opportunity to bring its operations within the provisions of section 402(c)(1) of the act; and (2) that respondents and those who support their position believe the Administrative Law Judge erred in concluding that other shippers' associations may not become members of Sunshine because neither the provisions of the Interstate Commerce Act, its legislative history, nor the decisions of the courts and this Commission support such a result.

In its exceptions, the Bureau takes the position that the Administrative Law Judge failed to determine, as the order initiating this proceeding directed, whether Sunshine has unlawfully engaged in operations as a freight forwarder and whether the other named respondents participated in such violations. Instead, the Bureau asserts, the Administrative Law Judge chose a middle ground and failed specifically to classify the operations involved. The Bureau also contends that the Administrative Law Judge erred in finding that Sunshine was not holding out or undertaking to perform services for the general public; that it was not performing such services for compensation; that the Bureau failed to sustain its burden of proof with respect to Sunshine's allegedly unlawful operations; and that Sunshine's operations do not fall within the statutory definition of a freight forwarder.

Respondents and interveners in support (except NCNPSA) argue on exceptions that the Administrative Law Judge erred, as a matter of law, in failing to dismiss the investigation for want of jurisdiction over respondents. They also challenge the lawfulness of the Administrative Law Judge's conclusions to the effect that Sunshine is not a bona fide shippers' association; that other shippers' associations do not qualify for membership in Sunshine; that members who neither use nor reasonably expect to use Sunshine's services in the future are not bona fide members and must terminate their memberships; that shippers who are members of other associations and use Sunshine's services by reason of their memberships in such other associations must become dues-paying members of Sunshine; that persons other than members of Sunshine or their representatives serve on its board of directors; that payment by Sunshine of loss and damage claims incident to transportation is inconsistent with the status of a shippers' association; that compensation paid to part-time employees by Sunshine's executive secretary must be assumed by association members; and that surplus funds in the hands of Sunshine must be returned to its members on a pro rata basis. Finally, these parties take the position that the Administrative Law Judge erred, again as a matter of law, in failing to recognize certain alleged violations by the freight forwarder industry of section 10 of the Clayton Act [15 U.S.C. 20] and in failing to recommend that the industry, or at least intervener Florida-Texas Freight, be investigated, admonished, and censured.

In its separate exceptions, NCNPSA maintains that the recommended conclusions were incorrect in four respects, namely: (1) that payment of loss and damage claims is inconsistent with the nonprofit status of a shippers' association; (2) that election of nonmembers to the board of directors of a shippers' association constitutes an abdication of control of an organization and responsibility for its affairs; (3) that accumulation of surplus funds by an exempt shippers' association is prohibited; and (4) that a manager of an exempt shippers' associ-

ation is precluded from personally paying for inconsequential operating expenses.

REPLIES

In their joint reply respondents and interveners in support argue that Sunshine's assertedly unlawful operations were neither conducted for compensation nor held out to the public. They rely on this Commission's decision in *Barre Granite Assn., Inc., Freight Forwarder Application*, 265 I.C.C. 637 (1949). They also maintain that respondents' operations were similar in many respects to those involved in other investigations conducted by this Commission and, therefore, they should not be found to be those of a freight forwarder as defined in the act. In this regard they rely on this Commission's decisions in *Natl. Motor Frt. Traf. Assn.* v. *Baltimore Shippers*, 323 I.C.C. 775 (1964), *National Motor Freight* v. *New Hampshire Shippers Co-op.*, 323 I.C.C. 658 (1964), and a court's decision in *Columbia Shippers and Receivers Association, Inc.* v. *United States*, 301 F. Supp. 310 (D. Del. 1969), reversing, in part, this Commission's decision (designated as being one of general transportation importance) in *Natl. Motor Frt. Traf. Assn., Inc.*, v. *Columbia Shippers*, 105 M.C.C. 846 (1967).

Respondents and interveners in support also submit that the Bureau's exceptions fail to take into account this Commission's decision in *Atlanta Shippers Assn., Inc.—Investigation*, 322 I.C.C. 273 (1964), which established a two-part test for determining whether questionable operations are those of a freight forwarder or a bona fide shippers' association.[4] In addition, they contend that

[4] The *Atlanta* case, decided by division 1 and reported at 316 I.C.C. 259 (1962), was reconsidered by the entire Commission, *supra*. In the latter report, the distinctions between freight forwarders subject to regulation and shippers' associations not subject to the provisions of the act are analyzed. The test developed in that case for making necessary distinctions reads:

> Are the freight consolidating and distributing operations such that any person or persons other than the shipper-members of the association (a) have any right or ability to control, direct, or dominate such operations, or (b) bear the essential risks and burdens, financial and otherwise, of conducting the operations under consideration?

the Bureau ignored certain facts, as found by the Administrative Law Judge, to the effect that association members control the operations Sunshine conducts and that the members bear the essential risks of conducting those operations. Finally, respondents submit that they are entitled under the provisions of section 558(c) of the Administrative Procedure Act [5 U.S.C. 558(c)][5] to notice and an opportunity prior to the institution of a formal investigation to make changes in the organizational structure and operations involved so as to bring those operations within the provisions of section 402(c).

[5] Section 558(c) of the Administrative Procedure Act reads as follows:

> (c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—
>
> (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
>
> (2) opportunity to demonstrate or achieve compliance with all lawful requirements. When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

In its separate statement in reply to respondents' exceptions, intervener Florida-Texas Freight denies allegations that the freight forwarding industry has violated Federal law. It argues that operations conducted by affiliated subsidiaries of forwarders are lawful because they relate solely to forwarder operations and do not involve dealings in securities, supplies, or other articles of commerce, and that only dealings of that kind are proscribed by section 10 of the Clayton Act. It submits that competition is not lessened by the conduct of operations through the use of subsidiaries; that because this Commission has not promulgated regulations governing competitive bidding for carriers subject to part IV of the act, the qualifying provisions of section 7 of the Clayton Act apply; and that performance of services by freight forwarders through the use of subsidiaries is exempt from the effects of that statute.

In its separate reply, FFI asserts that respondents' request for dismissal of this proceeding for want of jurisdiction borders on the ludicrous because this is a factfinding mission the purpose of which is to determine whether the statute this Commission is charged to administer has been violated. It further argues that the Administrative Law Judge correctly found, on the basis of Sunshine's organizational structure and activities, that it is not a bona fide shippers' association; that control of Sunshine does not rest in the hands of its members; that it handles cargo claims as though it were operating as a regulated common carrier; that the memberships of certain purported members of Sunshine should be terminated; and that no basis has been shown for recommending the institution of an investigation of the freight forwarder industry.

Discussion and Conclusion

The functions of freight forwarders are succinctly described in this Commission's report in *Investigation Into*

Status of Freight Forwarders, 339 I.C.C. 711 (1971), beginning on page 713.[6] Freight forwarders are required by statute to obtain a permit from this Commission before engaging in or arranging for the interstate transportation of property. The fundamental issue raised on exceptions is whether respondent Sunshine is operating lawfully as a bona fide shippers' association not subject to that requirement or operating unlawfully as a freight forwarder without a license. Two sections of the act[7] explain when a permit is required and which services are subject to economic regulation by this Commission.

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[6] That description reads as follows:

> Freight forwarders assemble and consolidate shipments and provide break-bulk and delivery services for the shipping public. The forwarders hold themselves out to provide, in their own name and under their own responsibility, a through transportation service from the point of receipt of a shipment to final destination. They specialize in the transportation of small shipments, and derive their income from the difference, or spread, between the carload, truckload, or volume transportation charges they pay to the underlying common carrier and the higher rates paid to them by shippers for the transportation of their individual shipments. Forwarders publish their own tariffs applicable from origin to destination. They issue bills of lading and assume primary responsibility thereunder for the safe transportation of the freight. They bear the cost of the transportation they employ as well as the cost of solicitation, consolidation, billing, platform handling, loading and unloading, and investigation and payment of claims. * * *

[7] Section 410(a) of the act reads:

> No person shall engage in service subject to this part unless such person holds a permit, issued by the Commission, authorizing such service; * * *.

And section 402(a)(7) defines the services subject to regulation as follows:

> The term "service subject to this part" means any or all of the service in connection with the transportation in interstate commerce which any person undertakes to perform or provide as a freight forwarder, * * *.

Physical operations conducted by shippers' associations are for all practical purposes virtually the same as those of forwarders. See *National Motor Freight* v. *New Hampshire Shippers Co-op.*, *supra*, at page 664. The provisions of section 402(c)(1) of the act exclude from regulation single shippers moving their own traffic and groups or associations of shippers when they join together for the purpose of jointly consolidating or distributing their freight. This exclusion applies, however, only when such associations are acting for themselves or their members on a nonprofit basis and provided that members of an association exercise control over association activities. See *Atlanta Shippers*, *supra*, at page 285.

With these precedents and distinctions in mind, we now consider the several issues before us in this proceeding. We shall treat related questions and arguments as we discuss the major issues to which we now turn.

Jurisdiction.—We first consider whether this Commission has jurisdiction over respondents and the subject matter of this proceeding. Germain to that is whether respondents were given the notice to which they were entitled when an investigation of this kind is undertaken.

Briefly, respondents' position is that because the definition of "license" set forth in section 551(8) of the Administrative Procedure Act [5 U.S.C. 551(8)] includes the phrase "* * * statutory exemption or other form of permission," compliance by this Commission with the provisions of section 558(c) of that statute (see footnote 5) should have preceded institution of this investigation.

The initiating order was entered January 29, 1973. By letter dated February 21, 1973, respondents were notified by the Bureau of the facts and law that would be asserted at the hearing. This procedure and the content

of the letter notice satisfy the requirements of law applicable to a matter of this nature.

Our reading of section 558(c) persuades us that respondents' position has no merit. The provisions of that section only apply to proceedings involving applications for licenses. They do not, as the Bureau and FFI correctly point out, apply to investigations such as the one now before us. Given the duty to enforce the provisions of the Interstate Commerce Act, this Commission must examine operations which are alleged to have been conducted in violation of section 410(a). The notice given to respondents satisfies, in our judgment, the requirements of section 554(b) of the Administrative Procedure Act.[6] And we are convinced that that section, rather than section 558(c), applies in this case. Accordingly, the request for dismissal for want of jurisdiction and lack of proper notice is hereby denied.

Nature of Sunshine's operations.—Resolution of several issues depends on the exact nature of the operations Sunshine conducts. And in this connection we note that in the *New Hampshire* case, *supra*, this Commission delineated the way in which the two-part test established in the *Atlanta* decision (see footnote 4), relied upon by respondents, was to be applied. In *New Hampshire* it

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[6] Section 554(b) reads as follows:

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

was found that determining the status of questionable operations is not simply an exercise in which an abstract formula is applied to a limited set of facts. Secondly, it was observed at page 665 of 323 I.C.C., that the *Atlanta* test is:

> basically an abstraction that can only be applied after all of the facts and circumstances playing a pertinent part in the particular transportation operations under scrutiny * * * are * * * analyzed, both as individual elements and, more importantly, in their *relationship as components in the total mosaic of the functioning organization* under consideration. [Emphasis added.]

According to the statutory definition of the term "freight forwarder" (see footnote 3), certain elements must be present before such a status is achieved. Those elements are: (1) there must be a holding out to the general public as a common carrier (other than one subject to part I, II, or III of the act) to transport or provide transportation *of* property in interstate commerce for compensation; (2) there must be assembly and consolidation of shipments or provisions therefor; (3) there must be performance of break-bulk and distribution services or provision therefor; (4) responsibility for transportation from point of receipt to point of destination must be assumed; and (5) the services of a carrier subject to part I, II, or III of the act must be utilized. If one of these elements is missing, the operations in question are not those of a freight forwarder and, thus, a license would not be required.

Sunshine's shipper-members, including so-called member shippers' associations, are located at various points throughout the Northeast and Midwest. They ship to Sunshine at Jacksonville, mostly on a periodic basis. The so-called member shippers' associations are located in Brunswick, N.J., and St. Louis, Mo.; there is some

question as to whether there also is one located in Baltimore, Md. These associations consolidate traffic for their own members and forward it by rail to Sunshine on shipping orders prepared by and bearing the names of such member shippers. Briefly stated, then, Sunshine's operations consist of consolidating through the use of so-called member shippers' associations at points north of Florida, receiving shipments by rail from origins beyond that State, breaking shipments in Jacksonville, delivering local shipments in that city, consolidating remaining shipments in trailer loads, and forwarding them (mostly by rail) to and delivering them at other points in Florida. Under these circumstances the second, third, and fifth elements of the statutory definition of a freight forwarder clearly are present. We need give them no further attention at this point and our discussion may be centered on the first and fourth elements listed above.

Public holding out.—The question of Sunshine's public holding out is influenced by three factors; whether it may lawfully include among its members other shippers' associations, whether control of the association rests with its members, and whether services are provided for compensation.

When Sunshine was incorporated in 1971 its bylaws provided that membership in the association would be open to those whose business requires goods to be shipped in interstate commerce either as retailers, jobbers, wholesalers, or manufacturers when such shipments lend themselves to consolidation with shipments of other members. On February 6, 1974, the words "either as retailers, jobbers, wholesalers or manufacturers" were deleted from the bylaws in the belief that this would eliminate any doubt as to the propriety of other shippers' associations joining Sunshine. The record discloses that Sunshine has a total of 25 members, approximately one-third of which are so-called member shippers' associations, and one of

them, intervener New Jersey Shippers, has 90 members of its own.

To support the proposition that such associations lawfully may become members of other associations, respondents rely, ultimately but not entirely, on this Commission's disposition of two prior proceedings.[9] Both cases involved coloading of freight, a practice whereby the freight of a member of an association is either loaded on a vehicle with freight of another nonprofit shippers' association or offered to a consolidator or terminal agent for consolidation with freight of a nonmember, unaffiliated shipper.

Contrary to the implication in respondents' argument, a statutory three-judge court did not, in the *Columbia Shippers* case, address the question of association membership. Rather, that case involved the lawfulness of services performed for Columbia, which claimed to be exempt, by a small, for-profit corporation. Two types of services were involved. The first consisted of arranging for consolidation of member traffic; the second involved consolidating member traffic with that of an unaffiliated shipper. It is true that this Commission's cease and desist order with regard to such coloading was set aside by the court. That was done, however, because although the record revealed that the consolidator was under the effective control of Columbia, it did not support a conclusion that Columbia and the consolidator together provided *all of the services of a freight forwarder.* Columbia's membership did not include other shippers' associations and it was a bona fide association.

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[9] *Columbia Shippers and Receivers Association, Inc.* v. *United States, supra*; and *Pacific Coast Wholesalers' Assn., Investigation of Status*, 264 I.C.C. 134 (1945), modified on reconsideration, 269 I.C.C. 504 (1974), affirmed *per curiam* in *United States* v. *Pacific Coast Wholesalers' Assn.*, 338 U.S. 689 (1950).

In the *Pacific* case, another bona fide association was handling shipments of freight moving from nonmember consignors to member-consignees on a delivered-price basis. Members of the association received the benefit of lower volume rates by arranging for several nonmember consignors to combine their freight into a single shipment destined for association members. The association paid the underlying carrier's volume rates, billed each consignor the higher rates applicable to its portion of a consolidated shipment, and divided the spread or difference among its members. The court held that such service to nonmembers was not subject to regulation and, in affirming the lower court, the Supreme Court observed at page 691 of its opinion that there was "* * * no reasonable ground for ruling that the association was on a profit basis * * *."

Viewed against such factual backgrounds, neither of these cases supports respondents' position that shippers' associations properly may join other shippers' associations. Rather, they hold only (1) that section 402(c)(1) allows shippers to form an association on a nonprofit basis in order to secure the benefits of volume shipping; (2) that two bona fide shippers' associations, neither of which holds out its services to the general public, may coload their freight; and (3) that this is so because Congress did not intend to limit the statutory exclusion to internal coloading by members of one association not subject to regulation.

Next, respondents base their position on certain language contained in this Commission's credit regulations. Specifically, they rely on the fact that at 49 CFR 1320.10 the term "shipper" is defined as including shippers' associations. The credit regulations apply only to carriers subject to our jurisdiction; the rules govern the presentation of freight bills for all transportation charges except certain exceptions; and they establish the circum-

stances in which regulated carriers may extend credit to shippers and shippers' associations.

Arguments that these regulations are persuasive that a shippers' association may become a member of another association have no merit. First of all, the caveat "As used in this section" precedes the declaration that the one term includes the other. In addition, the regulations only apply to the presentation by carriers of freight bills and the extension by them of credit. Clearly nothing contained in these regulations supports the notion that one shippers' association may join another.

Respondents' final argument on the question of membership is based on the fact that in *Edgerton Coop. Oil Assn.—Investigation*, 105 M.C.C. 100 (1967), this Commission found an agricultural cooperative association to be an exempt association within the meaning of section 203(b)(5) of the act.

There appears to be no connection between the *Edgerton* case and the issue now under consideration. The issue in that case was whether an agricultural cooperative association composed of other agricultural associations still retained the identity of an association as defined in the Agricultural Marketing Act [12 U.S.C. 1141, *et seq.*]. Shippers' associations excluded from the provisions of part IV of the Interstate Commerce Act are not statutorily defined and what the Congress intended with respect to agricultural cooperative associations has no bearing on the composition of the membership of shippers' associations.

Florida-Texas argues that this Commission effectively answered the question of association membership in the negative in the *Atlanta* case. At page 282 of the report in that case it was said that

> • • • a group or association of shippers, in order to avoid regulation under the Freight Forwarder Act, must affirmatively stand aloof from the lure of a public calling and may not lawfully handle shipments unconnected with, and fundamentally unrelated to, the nontransportation functions of its member shippers. • • •

Sunshine not only transports property owned by its shipper-members, it transports property owned by the members of its so-called member shippers' associations. Associations of shippers have no direct beneficial interest in the property they handle for their members. In our judgment, they are for that reason incapable of qualifying for membership in a *shippers'* association. The statute limits the exclusion to the consolidating or distributing of freight to shippers "for themselves or for the members thereof."

Sunshine's position would be less tenuous were the statute to make some reference to member shippers' association. The statute, however, only refers to shippers. In our opinion, to allow associations of shippers to join other such associations would eventually bring on an entirely unintended situation—one in which associations of shippers could engage without limitation in the transportation of property owned by others, the only connection between these other being succeeding layers of memberships in associations. Shipper-members of Sunshine's so-called member associations are once removed from the control of Sunshine. In that sense, insofar as Sunshine is concerned, they are members of the general shipping public even though Sunshine chooses to call them otherwise. It is an uncontroverted fact that certain beneficial owners of property which Sunshine transports are not dues-paying members of Sunshine. In these circumstances, therefore, we are satisfied that the holding out of service to a part of the public (members of so-called member associations), as distinct from all of the general public, does not preclude a finding that there is a holding out within the meaning of section 402(a)(5) of the act.

Compare *Natl. Motor Frt. Traf. Assn., Inc.* v. *Piggy Back Shippers*, 322 I.C.C. 190, 201 (1964).

Control.—We turn next to the matter of control. For an association to be bona fide, shipper-members must control its activities and affairs. In its reply statement FFI stresses the fact that associations which purport to be members of Sunshine dominate its board of directors. It, therefore, argues that bona fide shippers have no real voice in its affairs. Based on our analysis of the record insofar as Sunshine's board of directors is concerned, we agree with FFI's conclusion.

We note first that Sunshine's bylaws provide for the corporation to be managed and controlled by a six-member board of directors, each of whom must be a member or representative of a member of the association. Directors are authorized to appoint all corporate officers, including the executive secretary, and local agents at points of collection and distribution of freight. The record reveals, however, that at Sunshine's first quarterly meeting, held in May 1971, four of the six persons elected to the board were neither shipper-members nor representatives of shipper-members. And at its meeting in February 1972, contrary to the bylaws, seven members were elected to the board. Of these, three represented other shippers' associations which claimed to have memberships in Sunshine, two represented members which did not use Sunshine's facilities, and the remaining two members represented shipper-members. These facts alone cast serious doubt over whether control of Sunshine's operations could be in the hands of its shipper-members.

No privity exists between shipper-members of Sunshine and members of its purported member associations. Individual shippers in the latter group do not become shipper-members of Sunshine by virtue of the fact that associations to which they happen to belong join it. The members of such associations must join. Unless they

do so they can neither control the operations Sunshine conducts nor be said to have assumed the risks and burdens incident thereto. The facts are clear. Sunshine's shipper-members do not control its operations. There has never been more than two members of its board of directors who were actual shippers or representatives of bona fide shipper-members. One illustration of this is the fact that the only claim to membership of Helme Products, the shipper-employer of Robert Wright, one of Sunshine's cofounders and its current president, is that Helme is a member of a purported member association. The requisite control for status as a bona fide shippers' association thus is lacking.

Compensation.—The statute precludes a shipper from purchasing, "for compensation," a complete transportation service in which the details, risks, and responsibilities of freight assembly, consolidation, forwarding, break bulk, and distribution are assumed for it by a person not licensed by this Commission. Hence, compensation is one of the basic distinctions between operations conducted by forwarders and shippers' associations.

Compensation is not defined in the act. In the sense that we are here concerned with it, however, it consistently has been referred to as the reward for which forwarders bargain with their customers. Thus, the nature of it is related directly to the charges assessed for rendering forwarding services. See 87th Cong. Rec. 8212, 8216 (1941); *Investigation Into the Status of Freight Forwarders*, *supra*; and *Freight Forwarding Investigation*, 229 I.C.C. 201, 209 (1938).

Respondents rely on this Commission's decision in the *Barre* case, *supra*, to support their contention that the operations they conduct are not provided for compensation. Our analysis of the facts, however, reveals that Sunshine's operations are distinguishable from those in-

volved in the *Barre* case. In *Barre*, bona fide member-shippers shipped on a collect basis to various consignees. Freight charges were prorated among consignees and collected by a distribution agent who deducted his charges and remitted the net balance to the association. The Commission found that under such circumstances services were not provided for compensation and, therefore, Barre could not be said to fall within the statutory definition of a freight forwarder.

The question of Sunshine's receiving compensation, on the other hand, turns on the net effect of certain uncontroverted facts. They are: (1) that Sunshine's bylaws provide that all charges to members for operations conducted shall, to the extent possible, equal all costs and expenses so that on an annual basis a zero balance is maintained; (2) that at the end of 1973, the first year in which it did not operate at a loss, Sunshine's balance sheet showed retained earnings of $7,753; (3) that Sunshine's rate schedule includes, assertedly for informational purposes only, a tariff of a motor carrier rate conference and rates contained therein are applied, upon instructions, to less-than-truckload (LTL) shipments moving beyond Jacksonville; (4) that Robert Wright (whose efforts, as noted earlier, contributed importantly to the formation of Sunshine) is its president, a member of its board of directors, and an employee of Helme Products which is not a shipper-member, (5) that Helme is only a member of a so-called member association, New Jersey Shippers Pooling Association; (6) that Wright testified that Helme saved $25,000 per year through its utilization of services provided by Sunshine; (7) that Sunshine changed its bylaws in an attempt to clarify the membership question; (8) that despite the fact that shipper-members of purported member associations are not members of Sunshine, they pay its charges and utilize its services to ship their property; and (9) that respondent deMontmollin and Wright were made aware of the

role which they played in the overall plan of operation—deMontmollin having proffered in the form of his salary based on tonnage, and Wright's employer having realized savings on its transportation expenses.

If ordinary freight forwarders are compensated by retaining the spread or difference between single shipment and volume rates of underlying carriers, failure of a shippers' association to return to its member-shippers a spread earned in the same manner would seem to constitute compensation. Sunshine retained a portion of the spread it generated. This cannot be overcome by its assertion that this was done solely for the purpose of preparing for the expense of this investigation because there were recipients or beneficiaries of the operations Sunshine conducted, that were not member-shippers. The operations it conducted clearly crossed the dividing line between freight forwarders and shippers' associations. Furthermore, mere reimbursement for expenses is sufficient to warrant a conclusion that operations were conducted for compensation. Compare *Atlanta*, *supra*, pages 279-282. In the circumstances here present, then, we are satisfied that retention of the surplus generated by nonmember traffic and compensation paid to deMontmollin on such nonmember traffic were not justified. Accordingly, we are convinced that Sunshine has held out to provide its services to the public for compensation.

Responsibility for through movement.—In determining whether Sunshine achieved the fourth element of providing service as a freight forwarder—accepting responsibility for through movements of freight—we look again to its operations. Our discussion earlier of the nature of Sunshine's operations leaves little doubt that such responsibility was assumed. Furthermore, in view of the facts (a) that this Commission has found the physical

operations conducted by shippers' associations to be practically the same as those of freight forwarders, and (b) that it is the view of respondent deMontmollin, according to his testimony, that the physical operations of each are exactly the same, the fact that responsibility was assumed is all the more apparent.

Sunshine clearly accepted responsibility for loss and damage to lading, a matter which will be discussed in other respects later in this report. In considering the matter of financial responsibility for property while in transit, however, and its bearing upon the status of a freight forwarder then being investigated, the decision of this Commission in *Hopke Freight Forwarder Application*, 285 I.C.C. 61 (1951), is helpful. In that case, which was called to our attention in the Bureau's exceptions, this Commission said at page 64:

> In *R.T.C. Term. Corp. Freight Forwarder Application*, 265 I.C.C. 641, 643, we found that if a service, in all other respects that of a freight forwarder, is held out to and performed for the general public, the person providing such service must be held to have assumed the burdens incident thereto, among which is responsibility to the shipper for the safe transportation of its property. As Hopke's service is held out to and performed for the general public, we find that he is responsible to shippers for the transportation of their property.

Sunshine's operations are not limited to consolidating or distributing shipments of its member-shippers. It holds out to serve the general public. A complete service in the movement of property is provided from point of origin to the ultimate destination at Jacksonville or beyond. Shipper-members of Sunshine's member associations rightfully should look, in such circumstances, to Sunshine for recovery of the value of any lading lost or damaged in transit. And Sunshine's procuring insurance, albeit limited, against such an eventuailty, when coupled with the other elements of its operations described earlier herein, is sufficient for it to have achieved freight forwarder status.

Nothing in the record indicates that Sunshine had an explicit agreement with the members of its so-called member associations. Yet it receives and consolidates shipments for them. This persuades us to believe that at least that much of its traffic and the activities involved in its transportation constitute unauthorized, and hence unlawful, for-hire freight forwarding service. Sunshine clearly assumed responsibility for transporting that traffic from origin to destination and it cannot now avail itself of the shelter afforded by section 402(c) of the act.

In light of the factual record before us and the ample legal precedents referred to earlier herein, especially the rationale of the *New Hampshire* case which calls for the totality of questionable operations to be analyzed, we are unable to arrive at any other conclusion than that Sunshine is conducting operations as a freight forwarder as defined in section 402(a)(5) of the act without a permit and that the other named respondents are participating in such violations.

Our analysis above also disposes of certain other issues. One is the Bureau's exception to the Administrative Law Judge's conclusion that it failed to meet the burden of proof imposed upon it. We believe the Bureau manifestly has made a prima facie case that Sunshine is, in fact, performing the functions of a freight forwarder. Having done so, the burden of going forward with the evidence shifted to respondents to explain either (1) why the operations in question do not come under the regulatory provisions of part IV of the act, or (2) why, as a bona fide shippers association, it comes under the

clarifying provisions of section 402(c) of the act. We conclude that respondents have failed in both respects.

Other exceptions.—Issues raised by exceptions filed by NCNPSA should be disposed of at this point. It maintains that the Administrative Law Judge erred in finding that nonmember directors do not qualify to serve as directors of shippers' associations, that such associations are not permitted to accumulate surplus funds, that payment of wages of part-time employees by deMontmollin was improper, and that payment of loss and damage claims was improper.

Members of a shippers' association who fail to control the movement of their freight are not entitled to the benefits of section 402(c). It follows, then, that only members or representatives of members of bona fide shippers' associations qualify to serve as directors. To conclude otherwise, it seems to us, would be to ignore the clear import of the language in the statute that the operations conducted be "for themselves or for the members thereof." The Administrative Law Judge correctly concluded, in our opinion, that members or representatives who are susceptible of control by members are the only ones who may serve on the board of directors of a bona fide association. Officers who do no more than carry out policy decisions formulated by members of a board of directors need not be members or representatives of members. But the key point here is the matter of control. Board members control operations. Officers do not. The Administrative Law Judge recognized that distinction in his initial decision and properly concluded that directors of shippers' associations must be shipper-members or representatives of shipper-members.

Accumulation of surplus funds and payment by deMontmollin of inconsequential operating expenses are acts that are inconsistent with the status of a bona fide shippers' association. However, some clarification also is

called for under the circumstances. Accumulation of surplus by a bona fide shippers' association may be proper in certain circumstances and for a limited time. Any such surplus, however, must represent accumulated savings resulting from reduced transportation costs and member-shippers must eventually share all of those savings. In Sunshine's case, however, nonmember traffic was transported. Savings realized on that traffic was compensation and, thus, money retained, or at least a portion of it, was in the nature of undistributed profits rather than undistributed savings.

The same reasoning may be applied to payment of wages to certain part-time employees. Payment thereof by deMontmollin had no other effect than to reduce Sunshine's operating expenses and increase its net profits. As such, the payments were inconsistent with the status of a bona fide shippers' association whose members must assume, and may not delegate to others in any respect, however, inconsequential, the risks and burdens of conducting operations.

Payment of claims and maintenance of insurance policies for that purpose are not improper acts, per se, insofar as shippers' associations are concerned. Shippers have a continuing interest in the quality of their products and the reduction of their overall costs. Furthermore, a shippers' association may cause loss or damage to lading in its consolidating or distributing operations. We see nothing inconsistent with an association, as an entity, assuming in behalf of its shipper-members responsibility for casualities it may cause or with the maintenance of insurance protection. However, to the extent that Sunshine assumed responsibility for lading shipped by non-members, it assumed the common law liability of carriers. That is inconsistent with the status of a bona fide shippers' association.

FASCO.—FASCO holds no authority from this Commission. Robert DeKroyft, one of three owners of FASCO, also is executive secretary of New Jersey Shippers Pooling Association and a director of Sunshine. Section 402(c)(2) of the act provides that shippers' agents are exempt from regulation only under certain conditions. Although the activities of FASCO might at first appear to be those of an exempt shippers' agent, in actuality they are activities which include the performance of service for Sunshine which is not a shipper but a forwarder. The statute specifies that in connection with the operations it conducts, an agent's responsibilities must be to shippers. In light of this we have no alternative but to conclude that the section 402(c)(2) exclusion is of no benefit to FASCO.

Investigation of the forwarder industry.—Allegations by respondents and interveners in support that the Administrative Law Judge erred, as a matter of law, in not recommending that the freight forwarder industry be investigated are challenged by Florida-Texas and FFI. Respondents' request for an investigation is based on the assertion that the forwarder industry has violated section 10 of the Clayton Act.

The substance of section 10 is that, except in certain limited circumstances, a common carrier engaged in commerce shall not have any dealings in securities, supplies, or other articles of commerce with another corporation when (1) such dealings exceed $50,000 in any 1 year, and (2) a member of the carrier's board of directors also serves as a director of or has a substantial interest in such other corporation. The Administrative Law Judge concluded that evidence adduced by respondents of alleged violations of the provisions of section 10 was insufficient to warrant a recommendation that the industry be investigated or that Florida-Texas be censured.

Florida-Texas denied that it has engaged in so-called "secret dealings" with its affiliates. Because the provisions of section 10 only apply to dealings in securities, supplies, or other articles of commerce, it claims that they do not apply to the performance by subsidiaries of forwarders of the physical operations forwarders are authorized and required by law to conduct.

This Commission has not heretofore promulgated regulations governing competitive bidding among carriers subject to part IV of the Interstate Commerce Act. We have been given no reason to do so. Moreover, the provisions of section 7 of the Clayton Act remove any doubt that the mere existence of interlocking directorates between a parent forwarder and its subsidiaries violates that statute. Section 7 limits the scope of the Clayton Act to situations in which the effect of such relationship is to substantially lessen competition.

The scope of our regulations with respect to competitive bidding, set forth at 49 CFR part 1010, is limited to carriers subject to parts I, II, and III of the Interstate Commerce Act. More importantly, insofar as we are here concerned, however, is the fact that the record before us is completely devoid of any evidence of reduced competition in the forwarder industry, or that operations conducted by subsidiaries of freight forwarders have been designed to serve that end. The record also fails to provide us with any indication that dealings between forwarders and their subsidiaries constitute dealings in securities, supplies, or other articles of commerce. Under the circumstances, we are satisfied that the Administrative Law Judge's decision not to recommend that an investigation be instituted was correct.

Cease and desist order.—The provisions of section 403(a) of the act give this Commission full discretion as to when to issue cease and desist orders. While there may be circumstances where justice and reason require us to

forego issuance of such orders, we cannot ignore or condone violations of the statute that the Congress has charged us to administer and enforce. In our opinion, the Administrative Law Judge's recommendation to grant Sunshine a period of time within which to conform its operations to what apparently would bring them within the scope of the protective provisions of section 402(c) goes beyond the bounds of reasonableness in the circumstances here present. If Sunshine had any doubt about the propriety of broadening its membership to include other shippers' associations, it could have petitioned this Commission to issue a declaratory order on the point. It chose not to do so.

Furthermore, we have serious reservations about the wisdom of our directing, as the Administrative Law Judge recommended, an other-than-bona fide association of shippers to alter its organizational structure or to discontinue certain of its activities. If Sunshine were not in fact conducting freight forwarder operations we would have no power to monitor its activities, to give it counsel, or otherwise require it to do anything. We believe Sunshine has been conducting unlawful operations. Because of that justice and reason cannot be said to require that it be given an opportunity to make whatever changes are needed to qualify for the shelter from regulation provided by section 402(c). We are convinced that issuance of an appropriate cease and desist order is warranted in this case.

FINDINGS

We find that services provided by respondents in the transportation of property for compensation in interstate commerce, as described in this report, are those of a freight forwarder as defined in section 402(a)(5) of the Interstate Commerce Act; that respondents have been and are continuing to render this service in the

manner described in this report without appropriate authority therefor from this Commission in violation of section 410(a) of the act; and that an order should be entered requiring them to cease and desist and thereafter to refrain and abstain from performing services of the character and in the manner found in this report to be unlawful unless and until there is in force and effect with regard thereto, appropriate authority therefor obtained from this Commission.

We further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

An appropriate order will be entered.

APPENDIX

Statement of facts of the Administrative Law Judge:

Sunshine was incorporated in the State of Delaware on March 9, 1971, as a non-profit corporation, and on March 16, 1971, it filed its articles of incorporation in the State of Florida. Its incorporators were: O. C. Beakes, B. Kemp Haskell, and R. M. Simons, of Jacksonville, Fla., and its principal place of business is at 600 Field Avenue, Jacksonville. Its principal function is the receipt of carload shipments from northern origin points, the breaking of these shipments in Jacksonville, the delivery of local shipments in Jacksonville; the consolidation, forwarding, and delivery of shipments to other points in Florida. Sunshine neither owns nor operates any motor vehicle equipment and is not involved physically in the handling of freight. It holds no authority from this Commission.

Immediately prior to the incorporation of Sunshine, Messrs. H. C. Bailey, Jr., D. J. Lanahan, Watson Ramsey, Jr., Wallace B. Covington, and L. B. Wright, all Jacksonville businessmen, signed a preincorporation agreement, in which it was stated that the parties desired to create a shippers association within the purview of section 402(c) of the act for their benefit and for the benefit of others similarly situated, and each party agreed to lend the association the sum of $300. The loans were to be repaid from funds generated by operation of the association, and the lenders were given promissory notes with interest at 10 percent.

Sunshine's certificate of incorporation recites that its purposes are, on a nonprofit basis, to assemble and consolidate, or to arrange for the assembly or consolidation, for its members, of less-than-carload and LTL freight into carload, truckload, and other quantity lots, and to arrange thereafter for the shipment of such carload,

truckload, or any other quantity lots, over the lines of common or other carriers to Jacksonville, Fla., or other points within the State of Florida, or elsewhere as the board of directors may, from time to time determine, and at such point or points of destination to break bulk and distribute, or arrange for the break bulk and distribution of such shipments to the members of Sunshine or others at the direction of such members. The further stated purpose of Sunshine is to provide, for the mutual benefit of its members, an advisory traffic service for the solution of their transportation problems and to assist members as shippers and/or receivers of freight to consolidate and distribute their freight on a nonprofit basis for the purpose of securing the benefit of carload, truckload, or other volume rates within the purview of the Interstate Commerce Act, part IV, section 402(c). The certificate further states that Sunshine is not organized to transport or to provide for the transportation of shipments as a common carrier or otherwise, nor to assume liability for the transportation of such shipments as a common carrier or otherwise.

Also, the certificate provides that the activities and affairs of the corporation are to be governed by a board of directors, the number of directors to be fixed by the bylaws, but in no case shall the number be less than three. There is a further provision that the directors shall be elected by the members at the corporation's annual meetings, but the directors need not be members of the corporation unless required by its bylaws. The certificate further provides that the corporation may elect such officers as the bylaws may specify, who shall have such titles and exercise such duties as the bylaws may provide. Another provision in the certificate of incorporation is that Sunshine shall not have any capital stock and no profits shall be made or dividends declared to members of the corporation or to any one else.

The bylaws of Sunshine restate its purposes and functions, set forth the requirements for membership, set membership fee of $10 annually, provide for annual and special meetings, and notice of the time, place, and purpose of meetings, and for the voting rights of members and the requirements of the majority rule.

With respect to membership requirements, the bylaws provide that membership shall be open to responsible individuals, partnerships, companies, corporations, and other firms and organizations (1) whose business requires the shipment of goods or merchandise in interstate commerce, either as retailers, jobbers, wholesalers, or manufacturers; and (2) whose goods or merchandise to be shipped and the nature of the shipments to be made lend themselves to the consolidation with shipments of the membership in general of this corporation. (Article 3.1 of the bylaws was amended on or about February 6, 1974, by deleting the words "either as retailers, jobbers, wholesalers, or manufacturers." It was thought that this would eliminate any doubt as to the propriety of other shippers associations joining Sunshine.)

As to the directors, the bylaws provide that the operations and properties of the corporation shall be managed and controlled by six directors, each of whom shall be a member of representative of a member of the corporation and, except for the first board of directors, the number may be fixed from time to time by the board of directors or members. Regular meetings of directors are to be held quarterly or at such other intervals as may be determined by the board, and meetings of directors may be held at any place that the board may from time to time determine. In setting forth powers and responsibilities of the directors in conducting and managing the affairs of the corporation, the bylaws provide that the directors shall appoint all corporate officers,

including an executive secretary, and local agents at points of collection and distribution of freight. Directors are to serve without compensation.

The bylaws specify the corporate officers, including an executive secretary, to be selected by the directors and prescribe their terms of office and duties. The bylaws state that the executive secretary, subject to the continuing supervision and control of the board of directors, shall (1) supervise and manage all the day-to-day operations and affairs of the association, (2) prepare cost studies, (3) promptly inform members and directors of changes, extensions, improvements, and reductions of operations, or any other changes affecting the corporation, (4) keep a correct list of the names and addresses of the members of the corporation, (5) attend all meetings of members and the board of directors, (6) keep a Minute Book of such meetings and transactions, (7) keep custody of all corporation records, (8) prepare and send out all meetings notices, (9) with the advice and assistance of the treasurer, by March 31st of each year, have prepared by a certified public accountant or public accountant, and submit to the membership a financial report for the calendar year ended the previous December 31st, and (10) have such other powers and perform such other duties pertaining to his office as may be required by the board of directors.

According to the bylaws, the guiding principle for all operations of Sunshine is that all charges to members shall, to the extent possible, equal all costs and expenses of operations so as to come out to zero. Under the bylaws, Sunshine is not responsible for loss or damage to shipments; members agree that they will not assert any claim against Sunshine for any loss or damage, but Sunshine or its agent or employees will file claims on behalf of the member involved against the party or parties responsible and will make every effort to collect or recover

for a member. Also, Sunshine is not required to carry insurance beyond that necessary to cover legal liability in respect to its operations as a nonprofit corporation.

On May 16, 1971, the first meeting of Sunshine was held pursuant to waiver of notice. The following members were present and were elected to the board of directors: R. P. Wright, Barry W. Covington, D. J. Lanahan, Charles O'Leary, H. C. Bailey, Jr., and B. Arthur Carolan. None is a shipper-member or a representative of a shipper-member, except Wright and Carolan. Immediately following the membership meeting on May 6, 1971, the directors, with Lanahan presiding, held a meeting and elected the following slate of officers; R. P. Wright, president; Charles O'Leary, vice president; O. C. Beakes, secretary; H. C. Bailey, Jr., treasurer; Harry deMontmollin, executive secretary.

At a meeting held on February 8, 1972, the following were elected directors; R. P. Wright, H. C. Bailey, Jr., B. Arthur Carolan, Barry W. Covington, Harry Bradt, J. L. Peters, and Robert DeKrofyt. Three of these represent other shippers associations who claim membership in Sunshine, two represent members who do not use the facilities of Sunshine and two represent shipper-members of Sunshine. As of April 24, 1972, five shippers associations claimed membership in Sunshine and as of January 31, 1974, eight shippers associations claimed membership therein.

At the May 1971 meeting, the compensation for the executive secretary was fixed at 15¢ per hundredweight of freight handled with a guaranteed draw of $250 a week, and the directors authorized him to negotiate a lease for Sunshine's operations, and to obligate Sunshine to pay the normal rent, telephone, utilities, postage, and printing. Also, the officers were instructed to negotiate a contract for deMontmollin's services.

DeMontmollin has served continuously as Sunshine's executive secretary since May 1971. On December 7, 1971, Sunshine and deMontmollin entered into a contract, effective as of May 1, 1971, covering the latter's services as executive secretary, stating, among other things, that deMontmollin is skilled in the surface transportation of freight and that Sunshine has need for him to advise, assist, manage, and direct the transportation of the freight of its members. His compensation was reaffirmed with a minimum of $250 a week, except that in computing the 15¢ per hundredweight, volume shipments are excluded. In the contract, deMontmollin was referred to as a contractor and executive secretary, and his duties were defined as supervising Sunshine's activities in the movement of freight for its members under the direction of the officers and directors of Sunshine, to make reports to the officers and directors, and to attend membership meetings when requested. By its terms, the contract expired on May 1, 1972. DeMontmollin continues to serve as executive secretary under an oral understanding with the officers of Sunshine. During 1973, his total compensation was about $34,000.

The physical operations incident to the handling of freight at Jacksonville are conducted by FASCO pursuant to a contract entered into between Sunshine and FASCO on December 7, 1971, effective as of May 1, 1971. FASCO is owned by Raymond G. Mullady, Peter Yovich, and Robert DeKroyft. The latter owns Rapid Assembly Agency, Inc., of Neward, N.J., and is now an honorary director of Sunshine.

In effect, FASCO acts as a drayage agent for Sunshine at Jacksonville. FASCO performs the trailer stripping and other break-bulk operations at Jacksonville, the reconsolidation of traffic into trailer loads, the delivery of such consolidated trailer loads to the railroad for subsequent movement to other points in Florida, and, in

addition, it handles cartage operations in the delivery of freight destined to points within the Jacksonville commercial zone. Freight moving beyond Jacksonville is transported by common carrier, mostly via rail, either directly to consignees or to cartage companies for ultimate delivery to the various consignees. Some moves by motor vehicle in LTL lots. In the Jacksonville terminal area, FASCO makes the following charges: pickup and delivery in the terminal area, 50¢ per hundredweight with a minimum of $3; unloading and segregating in and from boxcar or trailer, 35¢ per hundredweight; consolidation charge for outbound shipment, 23¢ per hundredweight; solid load delivery within terminal area, 15¢ per hundredweight with a $45 minimum; trailer pickup and return, $15 per trailer; terminal charge for handling trailers beyond Jacksonville, $5; and cutting bills of lading, if required, 25¢ per bill.

THE BUREAU'S EVIDENCE

The Bureau's principal witness was Willis E. Johnson, the Commission's district supervisor, Atlanta, Ga., who, together with District Supervisor, Herman Fauss, of Jacksonville, Fla., conducted an investigation into respondent's activities during the period April to July 1972. Among other things, Johnson testified that Sunshine's certificate of incorporation prohibits the distribution of dividends; that neither dividends nor refunds have been paid to Sunshine's members. Johnson further testified that as of April 24, 1972, there were 19 members listed on Sunshine's membership roster, that one of the members listed, namely, Industrial Office Supplier's, Inc., was not in fact, a member, that five of the members of Sunshine are other shippers associations, and that four representatives of such associations are directors of Sunshine.

Johnson stated that other shippers associations are not eligible for membership in Sunshine because Sunshine's bylaws limit membership to retailers, jobbers, wholesalers, and manufacturers, and that shippers associations do not fall in any of those categories. As against this, respondents contend, and presented evidence to show, that the organizers of Sunshine intended from the beginning to make membership in Sunshine available to other shippers associations, and that it was never the intention of the board of directors, by definition of membership eligibility in the bylaws, to preclude membership of other shippers associations in Sunshine.

Johnson further testified that deMontmollin, who became Sunshine's executive secretary, had been employed for some 30 years in the freight forwarder industry, and that he had organized and set up Sunshine. He testified further that deMontmollin contacted and made arrangements with various cartage companies for the delivery of shipments at Florida points beyond Jacksonville; that deMontmollin put together or published a schedule of rates covering LTL freight from Jacksonville to other Florida points; that deMontmollin has one or two part-time employees in his office whose compensation is paid by deMontmollin rather than by Sunshine.

With respect to FASCO, Johnson stated that FASCO is owned by Richard Mullady, Peter Yovich, and Robert DeKroyft, that DeKroyft owns Rapid Assembly, Inc., a consolidation operation of Newark, N.J., that DeKroyft is executive secretary of New Jersey Shippers Pooling Association and is a director of Sunshine; that FASCO holds no authority from this Commission.

According to Johnson, the relationship between FASCO and Sunshine is determined by the December 7, 1971, contract, providing for FASCO handling pickup and delivery service, break-bulk and consolidation operations on behalf of Sunshine for compensation based on hundredweight and trailer loads. With specific reference to the method of operation, Johnson testified that shipments

(trailers or boxcars made up of freight of various shippers and shipper association members) originating principally in the East and Midwest, are consigned to Sunshine at Jacksonville. Most of the shipments studied arrived in Jacksonville via rail. At this point, FASCO strips the trailers and reconsolidates the freight into trailers provided by Seaboard Coast Line Railroad. The trailers are then moved by piggyback rail service or by motor common carrier from Jacksonville and consigned to various cartage agents at such Florida points at Hialeah, Orlando, and Tampa for ultimate delivery. As to freight destined to the Jacksonville commercial zone, FASCO makes delivery. On reconsolidated shipments moving outbound from Jacksonville to other Florida points, Sunshine is listed as the consignor on all bills of lading, and as consignee on inbound shipments.

Johnson presented shipping documents of 20 representative shipments covering in excess of 100 shipments handled by Sunshine and/or FASCO in January 1972. For the most part, shipments coming into Jacksonville are prepaid. On outbound shipments from Jacksonville, Sunshine pays the freight charges for the transportation, as well as the delivery charges of the various cartage companies, and Sunshine then bills the total transportation charges back to its shipper-members. In addition, Sunshine bills its shipper-members a nominal charge of $5 a shipment for its service.

On cross-examination, Johnson conceded that deMontmollin may have set up the physical operations of Sunshine rather than organizing it, and that Messrs. Wright and Carolan, shipper-members of Sunshine, were the organizers and original board members of Sunshine. Also, the witness stated on cross-examination that deMontmollin was not present at the organizers' meeting of March 19, 1971, or at either the members' meeting or the directors' meeting of May 6, 1971. Witness Johnson admitted that there had been no serious violations by Sunshine of its own bylaws, and with respect to the initial funding of Sunshine, he conceded that interest-bearing loans had been repaid.

The remaining six witnesses for the Bureau are affiliated with Sunshine either as members, organizers, or officers. Among these is respondent deMontmollin, who, in response to a question as to who had "the original idea to form this association," testified that he had a meeting in January 1971 with Messrs. Wright, Carolan, and DeKroyft, that they related to him "their ideas in connection with a shippers association," that he (deMontmollin) was employed at that time, and that he was asked during the meeting whether he would be interested in "running" it (Sunshine); that he assumed his duties as executive secretary in May 1971; that his contract of employment of December 7, 1971, retroactive to May 1, 1971, has expired, but that he continues to work for Sunshine "on a week-to-week basis."

He further testified that he did not know who prepared Sunshine's corporate charter and that he had nothing to do with the negotiation of the contract between Sunshine and FASCO; that he has no knowledge of how membership was solicited or who contacted prospective members, but that he made some contact and did "some leg work" in connection with the possible interest of members on instructions from Messrs. Wright and Beakes; that Sunshine's arrangements with cartage companies for distribution in Hialeah, Tampa, and Orlando were made by Sunshine's board after his discussions with the cartage companies; and that on consolidated shipments out of Jacksonville, FASCO makes the arrangements and handles all the paperwork incident thereto, and Sunshine receives copies of all documents relating to inbound and outbound freight.

In describing his duties as executive secretary, deMontmollin stated that he is responsible for Sunshine's day-to-day operations; provides tracing, rating, and other incidental services; maintains a record of accounts receivable and accounts payable and bills charged to members in accordance with instructions from the board. He further testified that he prepares rate information pursuant to instructions from the board, that he makes no computations, makes no determinations, and makes no recommendations, but simply reports to the board; further, on instructions from the board, he files claims against line-haul and delivering carriers in the name of the beneficial owners of the traffic involved, and takes care of routine correspondence, including notice of meetings, the furnishing of rate information, and financial reports to members. In addition to his position with Sunshine, deMontmollin acts as a transportation consultant for others, for which he receives compensation. Except for the executive secretary, the witness stated no other officer or director of Sunshine receives compensation from Sunshine. Sunshine has a checking account and all checks must bear any two signatures from among the executive secretary, secretary, and treasurer. With respect to FASCO, the witness testified that it follows a routing guide as to those shipments reconsolidated for movement beyond Jacksonville.

Throughout deMontmollin's presentation, he emphasized that outside of his general supervisory duties with Sunshine and his conduct of its day-to-day operations with respect to the movement of traffic, his duties and responsibilities are only those specifically authorized by Sunshine's board and delegated to him by Sunshine's president. He indicated that he saw nothing unusual in the fact of Sunshine having officers and directors who are nonshippers, and he admitted that several members of Sunshine are, in fact, other shippers associations. In

his opinion, the physical operations of a shippers association are exactly the same as those of a freight forwarder.

William C. German, who is president and chairman of the board of Perdue Office Furniture Co., of Jacksonville, testified that he became a member of Sunshine in early 1971 following discussions with Robert Wright. He indicated that he had no discussion with deMontmollin concerning membership. He testified that he filed a written application for membership, paid a $10 membership fee, and was notified of his acceptance as a member by Mr. Beakes. Since then, he has been supplied with a membership list, a copy of Sunshine's bylaws and information concerning freight charges. In response to a question as to why he joined Sunshine, German testified that at the time his company was in the process of making some changes with one of its major suppliers in Michigan and he thought that by joining the association he could possibly route some traffic into Jacksonville via Sunshine.

German testified further that he was neither an officer nor director of Sunshine at any time. Although he never attended a meeting of Sunshine, he receives notices of meetings and believes that he has the right to inspect the books and records of Sunshine if he so desires. In a general way, he is familiar with the activities of Sunshine, but has little knowledge of the latter's contract with FASCO or with deMontmollin, and is unfamiliar with Sunshine's rental arrangements and with the details of its operations.

Barry W. Covington, Jr., vice president of Ace Electric Supply Co., of Jacksonville, testified that his company became a charter member of Sunshine on the basis of a written application, that his company had loaned $300 to Sunshine at the beginning of its operation, that such loan has been repaid, and that deMontmollin did not

solicit the membership of his company. He further testified that he served as a director of Sunshine from May 1971 through September 1972, that during such period, he had regularly attended directors' meetings, as well as the initial membership meeting, and that he is familiar with the contracts between Sunshine and FASCO and between Sunshine and deMontmollin. He further testified that as a member of Sunshine, his company used the services of FASCO and Sunshine with respect to inbound shipments. He further indicated that as a member of Sunshine, his company would share any loss incurred by Sunshine if the board so decided. As to the future use of Sunshine by Ace Electric Supply Co., Covington testified that it was his intention to use Sunshine with respect to both inbound and outbound shipments and for the purpose of improving the capabilities of the Jacksonville community.

H. C. Bailey, Jr., president of C & B Salvage Co., testified that his company was one of the original members of Sunshine, that the initial contact between Sunshine and his company was made by Robert Wright, not by deMontmollin, that as an original member of Sunshine, C & B Salvage loaned $300 to Sunshine in early 1971, and that the loan has been repaid. Bailey further testified that he became a director and was elected treasurer of Sunshine and that he continues to hold those positions. He stated that the purpose of joining Sunshine was that he thought that his company would benefit by receiving shipments from Western and Northern States. He testified that he receives notices of all directors' meetings, that meetings are held every quarter and that he has attended most of the directors' meetings. He indicated that he is familiar with the contracts between Sunshine and deMontmollin and between Sunshine and FASCO. With respect to participation in Sunshine's financial losses, he indicated that the matter would be one for determination by the directors. He further testified that he has received information relating to the charges to be made for Sunshine's services and that his company used the services of Sunshine's with respect to traffic moving to C & B Salvage at Jacksonville. With respect to local cartage companies, Bailey testified that Robert Wright, as president of Sunshine, and not deMontmollin, made contacts and established the relationship between Sunshine and such cartage companies. He also testified that the board of directors votes upon and approves members, and that the board has the power to control and actually controls deMontmollin.

Marion W. Grant, secretary of Industrial Office Suppliers, Inc., of Jacksonville, testified that his company has never been a member of Sunshine and never used its facilities. However, Watson Rasey, a stockholder and chairman of the board of Industrial Office Suppliers, served as one of the organizers of Sunshine and was party to the preincorporation agreement. Although it appears that Industrial Office Suppliers, Inc., was never a dues-paying member in Sunshine, Ramsey's interest in Sunshine explains the reason for Industrial Office Suppliers being listed as a member of Sunshine.

Dennis J. Lanahan, president of Lanahan Lumber Co., of Jacksonville, testified that he was one of the founders of Sunshine, that he had loaned Sunshine $300, and that he had submitted an application for membership. In regard to his interest in Sunshine, witness Lanahan stated that he first discussed the matter with Beakes and thought it was a good thing for his company and for the city of Jacksonville. Witness Lanahan testified that throughout his membership in Sunshine he has been furnished with membership lists, bylaws, and information as to charges. He testified that he attended meetings in the past, but that due to the press of other business, he is no longer a member of Sunshine's board of directors

and presently holds no office in Sunshine. Although Lanahan has not used the services of Sunshine in the past, he has hopes that he might use it in the future. His contemplated future use of Sunshine would be outbound from Jacksonville to the north. It was his general understanding that the officers of Sunshine, rather than the directors, supervise and direct its operations. He stated that he relied on deMontmollin to (1) establish a rate level, (2) set up the cartage companies, and (3) arrange for the consolidations.

Edward N. Kee, regional manager of operations for Florida-Texas (a regulated freight forwarder) in Jacksonville, testified that he is charged with the responsibility for the solicitation of new accounts and for handling and investigating complaints. Kee testified that he became aware of the existence of Sunshine through information supplied by his company's Orlando manager, Walter Price, in August 1971. Kee stated that he forwarded information concerning Sunshine to Morris Krathen, president of Florida-Texas, who instructed Kee to pursue the matter further. Thereupon, Kee requested Price to conduct an investigation of Sunshine's operations into Orlando. As a result of this investigation, certain data were assembled showing shipments handled by Sunshine for its members, trailer loads originating at numerous points in the United States, consigned to Sunshine in Jacksonville, broken down at Jacksonville, and reconsolidated and shipped to Orlando. After this preliminary investigation, Kee contacted representatives of Republic Carloading and Distributing Co. and Universal Carloading, both freight forwarders, for the purpose of interesting them in the investigation of Sunshine. With such data, Kee and Robert Smith of Republic Carloading and Distributing Co. met with a representative of the Commission and turned over their material. Kee sponsored an exhibit purporting to show the loss of traffic suffered

by Florida-Texas as the result of Sunshine's operations. As reflected in this exhibit, the diversion study covered a period from August 1972 to August 1973 and reflected 17 shipments, 32,192 pounds and revenue loss of $1,437. Kee admitted that he did not know to whom the traffic was actually lost, but that much of it was traffic which Florida-Texas previously enjoyed.

Morris Krathen, president of Florida-Texas, stated that he believed there was some question as to the propriety of Sunshine's operations, and he, therefore, referred the matter to counsel. As to the business of Florida-Texas, Krathen stated that about 85 percent of all traffic originating in its origin area was destined to Florida, and that his company's authority was inbound or southbound only. He outlined the regulatory controls imposed upon freight forwarders and emphasized the costs attributable to freight forwarders as compared with unregulated shippers associations, estimating that in 1973, 4 percent of his company's total revenues or $513,000 was attributable to compliance costs. He expressed the view that it would constitute an unfair competitive advantage for a shippers association to receive traffic from other shippers associations. Among other things, Krathen stated that 2 percent of a freight forwarder's gross revenue must be set aside to provide for the settlement of claims, and that no such requirement is imposed upon Sunshine. As to the specific operations conducted by Florida-Texas, Krathen testified that pickup, delivery, and transfer operations purchased with respect to local commercial zone operations for the first three periods of 1973 amounted to an excess of $3.3 million. It was developed that the physical operations for Florida-Texas are conducted by wholly owned subsidiaries, Freightex Cartage, Inc., and Freightex, Inc. During 1973, the gross revenues of Freightex, Inc., exceeded $1 million and that of Freightex Cartage, $1.4 million, most of which is derived from Florida-Texas.

EVIDENCE OF RESPONDENTS

O. C. Beakes, secretary and general counsel of Sunshine, who has been practicing law for 35 years, testified that he prepared the preincorporation agreement and the certificate of incorporation, and that he maintains the minutes of directors' meetings as part of his duties. Beakes further testified that each preincorporator was to loan $300 to Sunshine, that he received that sum from all but one of the parties, and that the loans were subsequently repaid with interest. In describing his initial contact with Sunshine, Beakes testified that he was initially contacted by deMontmollin, who represented to Beakes that he was acting pursuant to instructions of Robert Wright, one of the originators of Sunshine. Thereafter, Beakes' contacts were through H. C. Bailey. Beakes stated that preincorporators included leading citizens of Jacksonville, as well as shippers operating in the area. According to Beakes, all of these persons are outstanding citizens well known in Jacksonville and independently wealthy. Beakes testified that he attends directors' meetings, that the meetings are entirely of a business nature, that the bylaws are observed in every detail and that minutes of the meetings are kept and submitted to the president for his approval.

On cross-examination, Beakes restated that deMontmollin contacted him concerning Sunshine, but that the latter was representing those parties who "were thinking about getting together a shippers association with other people. * * *" Beakes testified that it was not his responsibility to contact members of the association, but stated that those activities were conducted by Wright and Bailey. Beakes also testified that deMontmollin attended board meetings, but only at the invitation of the board. With specific reference to the first meeting of the association on May 6, 1971, Beakes testified that there were only six members, that those members were named

directors and officers at the same meeting. Beakes further testified that he prepared the incorporation papers for FASCO, which was formed 3 or 4 years prior to Sunshine. In addition, as general counsel for Sunshine, he participated in the preparation of the contract between Sunshine and FASCO. As to DeKroyft's selection as a director, Beakes testified that DeKroyft's status was intended to be that of a honorary director on a nonvoting basis and was so understood by the directors and members of the association. Also, Beakes testified that the bylaws of Sunshine were recently amended by deleting therefrom the words "retailers, jobbers, wholesalers and manufacturers." By this amendment, Beakes testified that while it was understood by all members that shippers associations would be eligible to join Sunshine, the amendments in the bylaws would eliminate any doubt concerning the matter.

Bernard A. Carolan, distribution manager for Henry Heidi, Inc., a candy manufacturer located in New Brunswick, N.J., and a member of Sunshine, is chairman of the board of New Jersey Shippers Pooling Association. He has been involved in transportation matters for some 36 years and is familiar with shippers associations. In addition to Sunshine, he has been affiliated with two other shippers associations. Among other things, Carolan testified that problems involved in the transportation of small shipments caused his company to avail itself of the benefits derived from membership in shippers associations, and that its problems were solved when his company began using the services of shippers associations. With repect to his involvement in New Jersey Shippers Association, Carolan indicated that that association has been moving traffic to Florida since 1950, used various distributors during that period and had some difficulties with the arrangement. The method of handling was that New Jersey Shippers Pooling Association would piggyback trailers to Jacksonville, where they would be handled

by local cartage agents, coloaded with shipments of other shippers associations and moved to other points in Florida, using the services of various cartage agents. In 1967, his company began using Florida All State Consolidators, which later became FASCO. In 1970, according to Carolan, Mr. Wright of Helme Products, suggested to him the formation of a shippers association in Jacksonville for the purpose of facilitating the movement of traffic to various destinations in the State of Florida. It was for these reasons, according to Carolan, that he assisted Wright in the formation of Sunshine and advocated the subsequent membership therein of New Jersey Shippers Pooling Association. Carolan indicated that if membership of one association in another association is determined to be illegal, he would recommend that each member of New Jersey Shippers Pooling Association become a member of Sunshine. Further, Carolan testified that it was the board of directors who controlled and determined the policy of Sunshine, and that as a member of Sunshine's board, he attempted to see that this was actually done. Carolan stated that one of the local cartage companies previously used by his company was Rapid Cartage, which was subject to a cease and desist order by the Interstate Commerce Commission. He indicated, however, that New Jersey Shippers Pooling Association stopped using Rapid Cartage because of poor service prior to the entry of the cease and desist order. It was Carolan's opinion that it was not only proper, but very necessary to have local Jacksonville businessmen as members and directors of the association.

Robert Wright, president of Sunshine and a member of its board of directors, an employee of Helme Products and its division Whitehall Products, stated that his company is a member of Sunshine as well as a member of New Jersey Shippers Pooling Association. With regard to his role in the formation of Sunshine, witness Wright testified generally as to his company's difficulty in moving

its product to Florida. He testified that in the past, his company used the Seaboard Coastline Railroad for its shipments out of Jacksonville to other points of Florida. Out of Jacksonville, these shipments were LCL shipments. Also, his company resorted to various motor carrier services out of Jacksonville. He testified that in the latter part of 1969 and early 1970, his company began experiencing extreme difficulties with services in Florida and that to resolve these difficulties, his first action was to join the New Jersey Shippers Pooling Association. As to the formation of Sunshine, Wright testified that he contacted Carolan and discussed the feasibility of a shippers association in the Jacksonville area. After this, he decided to form an association in Jacksonville. Through business contacts in Florida, Wright contacted deMontmollin and offered him a position as executive secretary with the association. This offer was conditioned upon the association's formation and upon local participation by Jacksonville businessmen, as he felt that local participation was important if the association were to succeed in Jacksonville. According to the original plan, the association would handle both northbound and southbound traffic, and with that in mind, he contacted Mr. Bailey, who, as indicated, was a former railroad employee, and now a Jacksonville businessman.

As to the actual formation of Sunshine, Wright asked deMontmollin to contact Beakes in order to begin preparation leading to the formation and incorporation of Sunshine. Wright reaffirmed the testimony of Beakes to the effect that O'Leary represented Baltimore Shippers and Receivers Association at the first meeting and that deMontmollin did not attend the initial membership meeting on May 6, 1971. At the first membership meeting, it was decided that to have a balanced slate of officers, it would be necessary to have them from Jacksonville, as well as elsewhere, and that particularly the

treasurer, secretary, and executive secretary should be local residents.

Wright further testified that while no lease has ever been executed for the office space occupied by Sunshine, the board had specifically authorized deMontmollin to sign a lease if the landlord so desired. At the first meeting, Wright stated, the board selected an auditor, authorized the establishment of a bank account, discussed the actual physical operations of Sunshine, determined that there was insufficient traffic to justify northbound movements out of Jacksonville, and selected Tampa and Miami as the Florida points for the movement of traffic out of Jacksonville.

As to the selection of cartage companies, the board instructed deMontmollin to find out and use at Tampa and Miami the same cartage company that the railroad uses, and that if the railroad did not have a local cartage company, deMontmollin was to ascertain the cartage companies operating in those areas and submit the names thereof to Mr. Wright for selection. According to Wright, at the first meeting, the board formulated membership charges and discussed supervision and control by the board of the duties and responsibilities of deMontmollin. He stated that the formulation of charges for members was based on out-of-pocket costs plus line-haul piggyback costs, a formula designed to achieve a zero balance for Sunshine. As to the delay in receiving the initial financial report, this was attributed to the auditor's insistence that Sunshine's fiscal year coincide with his schedule. Because of this, the auditor was replaced and thereafter financial reports have been promptly prepared and submitted. All of the action described above, according to Wright, were taken by the board or by officers representing the board.

Wright testified that after the first meeting on May 6, 1971, there was no other meeting of Sunshine until De-

cember 7, 1971, the reason being that Sunshine was just getting underway, tonnage was very slow, and "there was no reason to hold the meeting." In the interim between meetings, Wright stated that he personally exercised supervision over deMontmollin via weekly telephone conversations and by a personal visit to Jacksonville in September 1971. He further stated that in the December 1971 meeting, the board entered into a contract with FASCO; that this contract is still in existence but is terminable on 30 days' notice; that at a general membership meeting held on February 8, 1972, two representatives of FASCO attended the meeting at the invitation of Sunshine's president for the purpose of discussing problems relating to loading or unloading members' freight.

With respect to Sunshine's nonprofit status, Wright indicated that as of December 31, 1973, the first year in which Sunshine had surplus earnings, its balance sheet showed retained earnings of $7,753. According to Wright, the board decided not to distribute any of the surplus among its members because all of it would be necessary to pay legal fees incident to this proceeding.

He further stated that as of January 31, 1974, there were 27 members of Sunshine, all of whom had been approved by a majority vote of the board and notified by letter of their acceptance as members of Sunshine.

As to DeKroyft's status as an honorary director, Wright testified that both the board and DeKroyft had always been aware of DeKroyft's status as an honorary nonvoting director and that DeKroyft has never taken any position with respect to matters relating to FASCO and Sunshine. As to deMontmollin's selection of a drayman in Tampa, Wright testified that this action was done pursuant to his (Wright's) instructions and approval.

Regarding the inclusion of a motor carrier conference tariff in Sunshine's rate schedule, Wright testified that

such rates are applicable to LTL shipments, and that any such movement was subject to the member's instruction as to which carrier was to be used. On such movements, the carrier bills, the member directly and the particular tariff that was included in Sunshine's rate schedule was for information purposes only. Wright testified that his company, Helme Products, has received substantial benefits from its use of Sunshine, stating that its transportation and distribution savings have amounted to $25,000 a year. On cross-examination, Wright restated his position that deMontmollin's activities and duties are under the continuous control of the board of directors, and that when deMontmollin attended membership meetings, his attendance was always at the invitation of members. Wright maintained that his conduct and that of the board were at all times proper in all respects.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D.C., on the 11th day of July 1975.

No FF-C-50

SUNSHINE STATE SHIPPERS AND RECEIVERS ASSOCIATION, INC. ET AL.—INVESTIGATION OF OPERATIONS

Investigation of the matters and things involved in this proceeding having been made, and division 1, on the date hereof, having made and filed a report herein containing its findings of fact and conclusion thereon, which report is hereby made a part hereof:

It is ordered, That respondents Sunshine State Shippers and Receivers Association, Inc., Harry deMontmollin, and Florida All State Consolidators, Inc., severally and jointly, be, and they are hereby, respectively, ordered, and required to cease and desist forthwith, and thereafter to refrain and abstain from all operations, in interstate or foreign commerce, of the character found in said report to be unlawful and in violation of the Interstate Commerce Act, unless and until appropriate authority therefor is obtained; and that respondents, respectively, are further required to comply with the provisions of Rule 99 of the Commission's General Rules of Practice (49 CFR 1100.99).

And it is further ordered, That the statutory effective and compliance date of this matter be, and it is hereby, fixed as September 2, 1975.

By the Commission, Division 1.

ROBERT L. OSWALD,
Secretary.

[SEAL]

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, Acting as an Appellate Division, held at its office in Washington, D.C., on the 2nd day of December, 1975.

No. FF-C-50

SUNSHINE STATE SHIPPERS AND RECEIVERS ASSOCIATION, INC. ET AL.—INVESTIGATION OF OPERATIONS

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Joint petition of Sunshine State Shippers and Receivers Association, Inc., Harry deMontmollin, Florida All State Consolidators, Inc., American Institute for Shippers' Associations, Inc., and New Jersey Shippers Pooling Association, Inc., filed October 2, 1975, for reconsideration;

(2) Petition of the National Conference of Non-Profit Shipping Associations, Inc., filed October 2, 1975, for reconsideration;

(3) Reply by Freight Forwarders Institute, et al. filed October 20, 1975, to the petitions in (1) and (2) above;

(4) Reply by Florida Texas Freight, Inc., filed October 22, 1975, to the petitions in (1) and (2) above;

(5) Reply by Bureau of Enforcement, Interstate Commerce Commission, filed October 22, 1975, to the petitions in (1) and (2) above;

and good cause appearing, therefor:

It is ordered, That the petitions in (1) and (2) above be, and they are hereby, denied, for the reasons that the pleadings present no new or material matters of fact or law not adequately considered and properly disposed of by Devision 1 in its report and order of July 11, 1975, in the above-entitled proceeding, which findings are in accordance with the evidence and the applicable law, and that no sufficient or proper cause appears for granting the relief sought.

It is further ordered, That the report of the Commission, Division 1, of July 11, 1975, in this proceeding, reported at 350 I.C.C. 391, be, and it is hereby, corrected by deleting the parenthetical phrase "(except AISA)" where it appears on the eighth line of footnote 2 on page 392.

It is further ordered, That such correction shall be reflected in the bound volumes of the Commission reports.

It is further ordered, That the order of July 11, 1975, in the above-entitled proceeding, as indefinitely stayed pursuant to Section 17(8) of the Interstate Commerce Act, be, and it is hereby, reinstated, and the statutory effective and compliance date thereof be, and it is hereby, fixed as January 5, 1976.

By the Commission, Division 1, Acting as an Appellate Division.

ROBERT L. OSWALD,
Secretary.

[SEAL]

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 29th day of December, 1975.

No. FF-C-50

SUNSHINE STATE SHIPPERS AND RECEIVERS ASSOCIATION, INC. ET AL.—INVESTIGATION OF OPERATIONS

Upon consideration of the record in the above-entitled proceeding, and of joint petition of Sunshine State Shippers and Receivers Association, Inc., Harry deMontmollin, Florida All State Consolidators, Inc., American Institute for Shippers' Associations, Inc., and New Jersey Shippers Pooling Association, Inc., applicants, filed December 8, 1975, for a determination and announcement that the proceeding involves an issue of general transportation importance; and good cause appearing therefor:

It is ordered, That the said petition be, and it is hereby, denied, for the reason that in the judgment of the Commission, no issue of general transportation importance is involved.

By the Commission.

ROBERT L. OSWALD,
Secretary.

[SEAL]

Vice Chairman O'Neal, dissenting in part:

I would grant the petition for a finding of general transportation importance. This case may have the affect (sic) of unduly curtailing the scope of operations of shipper associations and adversely affecting the ability of the public to ship its goods to market.

Division 1, in its report and order of July 11, 1975, laid down a rule that shipper associations may not hold membership in other shipper associations. The Administrative Law Judge proposed the rule in his initial decision served September 18, 1974. The "rationale" for the rule is that by providing service to shippers which are indirectly related (through membership in another association which is itself a member) the association ". . . holds itself out to the general public as a common carrier to transport or provide transportation of property. . ." within the meaning of Section 402(a)(5) of the Interstate Commerce Act. That "rationale" is little more than a bare assertion which on its facts is not credible. Neither the assertion nor the facts of the case support the absolute rule laid down by Division 1.

The fact that an association is serving shippers which are not individually members, but rather belong to another association which is itself a member, does not necessarily amount to providing common carrier service to the general public. The universe of shippers which the association serves is still limited and may in any given fact situation be quite limited. Nor does Section 402(e) of the Act require privity of contract between an association and its associated shippers. It only speaks of a "group or association of shippers," without specifying the nature of the relationship. It is possible that an association may serve so many shippers bound together so loosely that in fact it is providing common carrier service under the subterfuge of operating as a shipper association. However, such a finding is a factual one which depends upon the fact pattern of each specific case; in each instance considering whether the association is in reality serving a limited group or the general public.

Neither Division 1 nor the Administrative Law Judge evaluated The Sunshine State Shippers and Receivers Association in these terms. The absolute rule created

by Division 1 should be abrogated and the Commission should evaluate the particular circumstances in this case and decide whether Sunshine is a *bona fide* shipper association.

The rule adopted by Division 1 which characterizes Sunshine as "holding out" to serve the general public dictated the adverse rulings on the questions of control, compensation and the other issues, including the accumulation of surplus funds and the provision of insurance and payment of claims.

The Commission should grant the joint petition and reconsider the case in the light of the proper criteria.

I concur with the Division that no investigation of the freight forwarder industry is justified on the basis of the record in this proceeding.

Supreme Court, U. S.
FILED
SEP 15 1977
MICHAEL RODAK, JR., CLERK

No. 76-1653

In the Supreme Court of the United States

OCTOBER TERM, 1977

AMERICAN INSTITUTE FOR SHIPPERS' ASSOCIATIONS, INC., ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The judgment and memorandum opinion of the court of appeals (Pet. App. 1a-2a, 1b-2b) are not reported. The opinion of the Interstate Commerce Commission is reported at 350 I.C.C. 391.

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission correctly ruled that an "association of shippers" within the meaning of Section 402(c) of the Interstate Commerce Act, 49 U.S.C. 1002(c), may not include another shippers' association as a member.

2. Whether the Commission properly issued its ruling without resort to the procedures specified in the license

revocation section of the Administrative Procedure Act, 5 U.S.C. 558(c).

STATEMENT

Under Section 402(a)(5) of the Interstate Commerce Act, as added, 56 Stat. 284, and amended, 49 U.S.C. 1002(a)(5), freight forwarders are common carriers which specialize in assembling and consolidating small shipments for the general public and in performing break-bulk and distributing services with respect to such consolidated shipments. See *Investigation into the Status of Freight Forwarders*, 339 I.C.C. 711, 713-714. See also *United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344, 345-346. Section 410(a) of the Act, 49 U.S.C. 1010(a), requires that freight forwarders operate under a permit issued by the Interstate Commerce Commission. Section 402(c) of the Act, 49 U.S.C. 1002(c), provides that the regulatory provisions governing freight forwarders do not apply to the operations of *bona fide* shippers' associations in consolidating or distributing freight for their members on a non-profit basis.

In 1973, the Commission initiated an investigation to determine whether petitioner Sunshine State Shippers and Receivers Association, Inc. ("Sunshine") was a *bona fide* shippers' association or whether it was operating as a freight forwarder without a permit, in violation of Section 410(a).

After hearings, the Administrative Law Judge found that Sunshine was not a *bona fide* shippers' association because its membership included other shippers' associations. The Commission's Division 1 adopted this finding and ordered Sunshine to cease providing freight forwarder services without proper authority. 350 I.C.C. 391. The court of appeals affirmed *per curiam* (Pet. App. B).

ARGUMENT

1. Petitioners contend (Pet. 6-14) that since the statutory provisions regulating freight forwarders do not apply to associations of shippers, they also do not apply to associations whose membership includes other shippers' associations. The court of appeals properly held that the Commission's ruling to the contrary is a reasonable interpretation of Section 402(c). As the court noted, nothing in the language of the Act suggests that Congress contemplated associations of associations of shippers (Pet. App. 1b).[1] Moreover, as the court of appeals also observed, "a line between freight forwarders and shippers associations must be drawn somewhere, and the function of line-drawing is normally one left to the sound discretion and expertise of the agency" (Pet. App. 2b). The Commission is entitled to deference in its interpretation of the statute which it administers.

If petitioners' construction of Section 402(c) were accepted, a single nationwide shippers' association, composed primarily of other smaller associations, might eventually represent and serve all or nearly all domestic shippers. Such a sweeping organization providing forwarding services for large numbers of unrelated shippers was not envisioned by Congress when it excluded associations of shippers from the coverage of statutory provisions regulating freight forwarders.

Legitimate shippers' associations, whose members pool their shipments to secure the benefits of volume rates, are not subject to Commission regulation as freight forwarders because they do not hold themselves out to the

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[1]Had Congress wished to cover such entities, it could have done so explicitly. See, *e.g.*, Section 402(b) of the Act, 49 U.S.C. 1002(b), expressly excluding federations of agricultural cooperative associations from regulation as freight forwarders.

general public as common carriers. Members are usually located in a single geographical area and are frequently concerned with the shipment of a particular kind of freight. The operations of a shippers' association are controlled by the association's members and the members assume all risks connected with the shipment of their freight. See *Columbia Shippers and Receivers Ass'n., Inc.* v. *United States*, 301 F. Supp. 310, 316 (D. Del.); *Freight Consolidators Cooperative, Inc.* v. *United States*, 230 F. Supp. 692, 696 (S.D. N.Y.).

By contrast, freight forwarders are independent venturers, controlling their own operations and assuming the risks associated with transporting the freight of their customers. They publish their own tariffs for a through transportation service from origin to destination. The Commission correctly determined that Sunshine was not a *bona fide* shippers' association because the individual shippers who used its services neither controlled its operations nor assumed the risks entailed in the movement of their goods.[2] 350 I.C.C. at 404-405, 407-408.

An additional argument supports the Commission's ruling. Under Section 402(c)(1), *bona fide* shippers' associations may serve only their own members. Where petitioner Sunshine handles freight for a member of petitioner New Jersey Shippers Pooling Association, Inc. ("New Jersey"), this requirement is not met. The actual shipper served by Sunshine, though a member of New Jersey, is not itself a member of Sunshine.

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[2]The Commission also found that Sunshine did not adhere strictly to the statutory requirement that an association of shippers operate on a non-profit basis. In retaining a portion of the spread between single shipment and volume rates of underlying carriers, Sunshine behaved as a freight forwarder. See 350 I.C.C. at 405-407.

Finally, contrary to petitioners' prediction (Pet. 9), the Commission's ruling will not produce dire consequences for smaller industries. At oral argument in the court of appeals, the Commission acknowledged that petitioner Sunshine could comply with the cease-and-desist order simply by enrolling the members of its member associations as members of Sunshine itself (Pet. App. 1b). The Commission also assured the court that, if such a strategy were adopted, members of another shippers' association who also joined Sunshine could appoint that other association (*e.g.*, petitioner New Jersey) as their agent to oversee their interests in Sunshine (Pet. App. 1b-2b). Thus, whatever benefits small shippers may derive from the membership of their association in a shippers' association like Sunshine will still be available under the Commission's ruling.

2. Petitioners assert (Pet. 15-17) that, under the Administrative Procedure Act ("APA"), 5 U.S.C. 558(c), they were entitled to an opportunity to comply with the Commission's statutory interpretation prior to the issuance of the cease-and-desist order. Section 558(c) requires such an opportunity before any "license" is withdrawn, suspended, revoked, or annulled. As the term is defined in the APA, 5 U.S.C. 551(8), "license" includes "an agency permit, certificate, * * * statutory exemption or other form of permission." Sunshine had not been granted any such license by the Commission. Under the language of the Interstate Commerce Act itself, the permit requirements applicable to ordinary freight forwarders do not apply to *bona fide* shippers' associations. It is not necessary for the Commission to confer any exemption on a *bona fide* shippers' association, and the Commission conferred no such exemption in this case.

The Commission proceeding was designed solely to determine whether Sunshine's operations were such that Sunshine might be characterized as an "association of shippers" within the meaning of Section 402(c). The Commission's negative answer to that question and its cease-and-desist order designed to terminate Sunshine's violations did not revoke or suspend any "license" held by Sunshine.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1977.

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1653

AMERICAN INSTITUTE FOR SHIPPERS' ASSOCIATIONS, INC.
HARRY DEMONTMOLLIN,
FLORIDA ALL STATE CONSOLIDATORS, INC.
NEW JERSEY SHIPPERS POOLING ASSOCIATION, INC.

and

SUNSHINE STATE SHIPPERS AND
RECEIVERS ASSOCIATION, INC.

Petitioners,

v.

INTERSTATE COMMERCE COMMISSION

and

UNITED STATES OF AMERICA

BRIEF IN OPPOSITION FOR RESPONDENT FREIGHT FORWARDERS INSTITUTE

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June 23, 1977

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D.C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1653

AMERICAN INSTITUTE FOR SHIPPERS' ASSOCIATION, INC.
HARRY DEMONTMOLLIN,
FLORIDA ALL STATE CONSOLIDATORS, INC.
NEW JERSEY SHIPPERS POOLING ASSOCIATION, INC.

and

SUNSHINE STATE SHIPPERS AND
RECEIVERS ASSOCIATION, INC.
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION

and

UNITED STATES OF AMERICA

BRIEF IN OPPOSITION FOR RESPONDENT FREIGHT FORWARDERS INSTITUTE

Freight Forwarders Institute is a voluntary non-profit trade association of regulated freight forwarders operating under Part IV of the Interstate Commerce Act. 49 U.S.C. § 1001, *et seq.* Its constituent and interested mem-

bers in this matter are listed in Appendix A. Its prime purpose is to protect, promote, foster and advance the interest of its members, and to that end it is empowered to and does participate, on behalf of its members, in administrative and judicial proceedings where issues important to freight forwarders are involved. Freight Forwarders Institute intervened in the Interstate Commerce Commission (ICC) proceeding below as an interested party and participated in the Court of Appeals Hobbs Act review proceeding in the District of Columbia Circuit. Determination of the principal issue herein will materially affect and influence the continued viability and existence of regulated freight forwarding.

OPINIONS BELOW

The *per curiam* judgment of the United States Court of Appeals for the District of Columbia Circuit entered February 24, 1977, appears at Petitioner's Appendix A, p. 1a. An accompanying memorandum appears at Petitioner's Appendix B, p. 1b.

The underlying administrative agency decisions are (a) the Initial Decision of Administrative Law Judge William J. Gibbons of the ICC, Docket No. FF-C-50, appearing at Petitioner's Supplemental Appendix, p. 3, (b) the Report of the ICC, 350 I.C.C. 391-423 (1975), appearing at Petitioner's Supplemental Appendix, p. 53, (c) the cease-and-desist order of the ICC issued July 11, 1975, appearing at Petitioner's Supplemental Appendix, p. 107, (d) Order of the ICC denying Petition for Reconsideration, appearing at Petitioner's Supplemental Appendix, p. 108, and (e) Order of the ICC denying petition requesting finding of General Transportation Importance, appearing at Petitioner's Supplemental Appendix, p. 110.

JURISDICTION

The unpublished order and judgment of the Court of Appeals was entered February 24, 1977. The petition for

writ of certiorari was timely filed May 25, 1977. Jurisdiction of the Court is invoked under 28 U.S.C. §§ 1254(1) and 2350(a) (1970).

QUESTION PRESENTED

Whether the ICC was correct in finding that a shippers' association is ineligible for membership in another "association of shippers," because such membership subjects the latter to regulation as a freight forwarder.

STATUTES INVOLVED

Sections 402(a)(5) and 402(c)(1) of the Interstate Commerce Act, 49 U.S.C. §§ 1002(a)(5) and 1002(c)(1) (1970) appears at Petitioner's Appendix C. Of particular importance is Section 402(c)(1) which exempts from regulation as a freight forwarder the following:

> (1) . . . operations of a shipper, or a group or association of shippers, in consolidating or distributing freight for themselves or for the members thereof, on a nonprofit basis, for the purposes of securing the benefits of a carload, truckload, or other volume rates . . . .

STATEMENT OF THE CASE

Petitioner for certiorari American Institute of Shippers' Association (AISA) intervened before the ICC in support of Petitioner Sunshine State Shippers and Receivers Association, Inc. (Sunshine) which was organized under the laws of Delaware in 1971 as a nonprofit corporation for the purpose of consolidating and distributing freight as an unregulated association of shippers ("retailers, jobbers, wholesalers or manufacturers") under Section 402(c)(1) of the Interstate Commerce Act.

Sunshine membership, however, consisted not only of individuals or businesses, but also of other shippers' associations that claimed exemption under Section 402(c)(1) of the Interstate Commerce Act. Petitioner New Jersey Shippers Pooling Association, Inc. (New Jersey Shippers) was typical of such shippers' association and, *inter alia*, was a member of Sunshine.

On January 29, 1973, the ICC on its own motion undertook an investigation of Sunshine with the purpose of determining whether Sunshine had been operating as a freight forwarder as defined in Section 402(a)(5) and was thereby in violation of Section 402(c)(1). The Administrative Law Judge Gibbons found that Sunshine was not operating as a bona fide shippers' association where it had allowed other shippers' associations to be members. The ICC adopted the Initial Decision of Judge Gibbons to find that Sunshine had been operating as a freight forwarder and issued a cease-and-desist order. 350 I.C.C. 391-423.

The U.S. Court of Appeals for the District of Columbia Circuit affirmed *per curiam* the ICC decision. (Petitioner's Appendix A, p. 1a) In its Memorandum Opinion the Court noted that Sunshine could bring itself into compliance with the cease-and-desist order by enrolling each member of its member associations as Sunshine members. (Petitioner's Appendix B, p. 1b). The Circuit Court properly found that the ICC had not acted unreasonably in its statutory interpretation of Section 402.

REASONS FOR DENYING THE WRIT

I. THE DEFINITIONAL ELEMENTS OF A SHIPPERS' ASSOCIATION PRECLUDE ITS MEMBERSHIP IN AN "ASSOCIATION OF SHIPPERS"

The underlying objective of Section 402(c) of the Interstate Commerce Act has always been to preserve to shippers the ability to secure reduced rates—truck-

load, carload, or volume rates—through consolidation of their freight. Through compliance with Section 402(c) a "shipper, or a group or association of shippers . . ." may benefit from statutory exemption from regulation as a freight forwarder. In order to qualify as a "group or association of shippers" certain elements must be met. The members of the shippers' association as principals must (1) have direct beneficial interest in the freight consolidated, (2) the association must act as the agent for the bona fide members who as principals control the activities and affairs of the association, and (3) the association must act as the agent for the bona fide members of the association who as principals assume the operational risks involved. A shippers' association cannot comply with these requirements if it includes in its membership another association of shippers.

A. If It Includes In Its Membership Other Associations Of Shippers, A Shippers' Association Is Not The Requisite Holder Of The Beneficial Interest Of Consolidated Freight.

The ICC has always considered the shipper referred to in Section 402(c) to be the beneficial owner of the freight, for only the beneficial owner directly benefits from the freight consolidation. It is clear that shipper associations, *per se*, have no freight of their own to consolidate. The legislative history underscoring Section 402(c) clearly shows the intent to have that section applied only to shipper associations as they normally operated. No shipper association has ever functioned as Sunshine seeks to do—by being a group, not of shippers (beneficial owners), but an association, group or federation of shipper associations.

Section 402(b) illuminates the objective of Section 402(c). Section 402(b) deals with agricultural cooperatives and by its specific terminology extends exemption from

regulation to cooperative associations or to "a federation of such cooperative associations". Congress when it intended to include federations in Section 402(b) did so by using definite and specific language. By abstaining from the use of such or similar language or even mentioning federations in Section 402(c), Congress clearly evidenced an intention to exclude federations of shipper associations from the scope of Section 402(c).

The District Court in *Freight Consolidators Cooperative, Inc.* v. *United States*, 230 F. Supp. 692 (S.D.N.Y. 1964) clearly set forth the basic differences between a bona fide shipper association and a regulated freight forwarder, as follows:

> Shipper associations do not hold themselves out to the general public, but perform services for their dues paying members . . . Members bear the burdens as well as share the benefits of its operations. . . . The operation . . . must be conducted by the association which at all times acts as agent for its shipper members who, as its principals (1) possess the exclusive right and ability to control the operations and (2) assume the essential risks entailed in conducting such operations. 230 F. Supp. 692, 696.

The bona fide member of a shipper association, of necessity, must be the principal and the association the agent. When shipper association A becomes a member of shipper association B, who is the principal and who is the agent? If shipper association A is the principal of shipper association B (here Sunshine) then do shipper association A's member principals automatically become principals of shipper association B? If so, they are principals who cannot exercise "the exclusive right and ability to control the operations" of shipper association B, because they are not members of shipper association B and, therefore, have no right to vote and, accordingly, are not covered by the parameters of Section 402(c).

If shipper association A, the member shipper association and the principal, is not the beneficial owner, then the consolidation is performed for nonbeneficial owners and, accordingly, is not a consolidation which has for its purpose securing for the bona fide shippers the benefits of consolidated rates. Therefore, the activity involved is not covered by Section 402(c).

Because of a repetitive history of non-payment of freight charges by shipper associations, the ICC promulgated regulations (49 C.F.R. § 1320.1 (1976)) requiring shipper associations to disclose in their transportation documents, issued to the underlying carriers (the railroads and trucks) the names of the beneficial owners of the property involved, for the obvious purpose of protecting the underlying carriers for beneficial owners cannot be insulated against the payment of their freight charges.

Transposing that situation to the instant case reduces it to these simple facts. Shipper association A seeks membership in Sunshine. Sunshine, by regulation, must disclose the names of the beneficial owners in its transportation papers when it tenders consolidations to the underlying carriers. Sunshine cannot list shipper associations A in its transportation papers, for shipper association A is not the beneficial owner of the property. If Sunshine lists the individual beneficial owners, who are members of shipper association A—but not members of Sunshine, Sunshine would admittedly be providing services to nonmembers and thus servicing the public at large. Under these facts, Sunshine's operations would not come within the purview of Section 402(c).

B. The Members Of A Shippers' Association Do Not Exercise The Requisite Control Where The Shippers' Association Is The Member Of An Association Of Shippers.

The shipper must have the exclusive right and ability to control the operations of Sunshine, an essential definitional element of a shippers' association. *Freight Con-*

solidators Cooperative, Inc. v. *United States*, 230 F. Supp. 692, 696 (S.D.N.Y. 1964); *Atlanta Shippers' Assn., Inc. —Investigation*, 332 I.C.C. 273, 285 (1964); *American Institute for Shippers' Association, Inc., et al.* v. *Interstate Commerce Commission*, 350 I.C.C. 391, 399 (1975). For example, the members of New Jersey Shippers exercise their individual control only over the activities and operations of New Jersey Shippers. New Jersey Shippers is a member of Sunshine. The individual members of New Jersey Shippers, not being members of Sunshine, have no voice in the formulation of policies or management of Sunshine, and are thus unable to direct the policies of Sunshine. The ICC found these individual members, in so far as they relate to Sunshine, to be members of the general public and "not dues-paying members of Sunshine." 350 I.C.C. 391, 404. Where there is a holding out of service to the general public, the association is acting as a freight forwarder and not a bona fide shippers' association.

"No privity exists between shipper-members of Sunshine and members of its purported member associations." 350 I.C.C. 391, 410. No control may be exercised by the members of New Jersey Shippers unless they join Sunshine individually as suggested by the ICC and approved by the Court of Appeals. *See* Petitioner's Appendix B, p. 1b. Thus, a shipper's association cannot be a member of an association of shippers.

C. Individual Shipper Members Must Assume Operational Risks As Principals With The Shippers' Association Acting As Agent.

The bona fide member of a shipper association, of necessity, must be the principal and the association the agent. *See Freight Consolidators Cooperative, Inc.* v. *United States*, 230 F. Supp. 692, 696 (S.D.N.Y. 1964). In normal operation, the individual members of a shippers' association assume the risks entailed in conducting the operations.

Sunshine had been acting as a freight forwarder by holding out its service to non-dues-paying members. As individual members of a member shippers' association, these shippers are not in privity with Sunshine in the transportation of the consolidated freight. Thus, there was in essence a public holding out of Sunshine's services.

II. PETITIONER'S RELIANCE ON *COLUMBIA SHIPPERS AND RECEIVERS ASSN., INC.* v. *UNITED STATES* IS MISPLACED

Petitioners rely on *Columbia Shippers and Receiver's Assn., Inc.* v. *United States*, 301 F. Supp. 310 (D. Del. 1969) to support the rationale that membership by one shippers' association in another shippers' association satisfies the statutory objective of furthering nonprofit activities. *Columbia* is easily distinguished from the present facts. *Columbia* involved the practice of co-loading freight between nonprofit shippers' associations. It did not involve the issue of one shippers' association's membership in another shippers' association. The practice of co-loading substantially differs from the public holding out of services practiced by Sunshine to non-dues-paying members. *See* 350 I.C.C. 391, 406-07.

Pacific Coast Wholesalers' Association, Investigation of Status, 264 I.C.C. 134 (1945), *aff'd Pacific Coast Wholesalers' Association* v. *United States*, 81 F. Supp. 991 (S.D. Cal. 1949), *aff'd per curiam* 338 U.S. 689 (1950), involved one shippers' association transporting freight between non-members and member consignees for a special price. As the ICC correctly found *Pacific* did not address the issue of one shippers' association's membership in another shippers' association. 350 I.C.C. 391, 406.

Appellants sought an interpretation of Section 402(c) which would permit shipper associations to so serve the public generally would destroy regulated freight for-

warding and the viability of Part IV of the Interstate Commerce Act. Obviously, regulated freight forwarders cannot exist in the competitive arena with completely unregulated, unrestrained and unfettered competitors, such as Sunshine seeks to become.

Clearly, Congress in painstakenly writing a comprehensive set of freight forwarding regulations (Part IV of the Interstate Commerce Act, § 401 *et seq.*, 49 U.S.C. § 1001, *et seq.* (1970)) did not so write Section 402(c) to destroy and make for nought the entire legislative scheme. But that is what appellants contend and the Interstate Commerce Commission resists. If regulated freight forwarding is to continue as a viable mode of transportation, the Interstate Commerce Commission must be supported in the efforts to stay the erosion of regulated freight forwarding and otherwise prevent the complete destruction of the Congressional scheme of regulation.

This is a case of first impression. No other case cited or discussed by appellants involves the issue raised here, namely the pyramiding of membership in a shippers' association through the device of a federation of shipper associations. For this reason, all cases cited by appellants are inapposite. The Court below was correct in affirming the Commission's inherent finding that Sunshine's operation was and is clearly contrary to the basic scheme of regulation and the specific intent of Section 402(c) of the Act.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

FREIGHT FORWARDERS INSTITUTE MEMBERS

Acme Fast Freight
Andrews International
Century Carloading
Clipper Express
Coast Carloading
Con Tra Mar
Florida-Texas
Lyons Transport
Merchant Shipper/Stor Dor
New England Forwarding
Ohio Fast Freight
Republic Freight System
Sheldon Forwarding
Springmeier Shipping
Superior Fast Freight
Texas Shippers
Transconex
Universal Carloading
Western Carloading
Western Freight Assn.
Westransco
Yellow Forwarding